80-415

No. _____

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant,

v.

WILLIAM M. GIBBONS, *Trustee,* CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO; FIRST NATIONAL BANK OF CHICAGO; HENRY CROWN, ET AL., UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; AND NEIL P. GOLDSCHMIDT, SECRETARY OF TRANSPORTATION,
Appellees.

On Appeal From The United States District Court For The Northern District Of Illinois, Sitting As A Railroad Reorganization Court

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

In the opinion of appellant Railway Labor Executives' Association* the following questions are presented by this appeal:

1. Should this Court, as an exercise of its supervisory powers over lower federal courts, review the manner in which the District Court, without giving detailed findings of fact and conclusions of law, enjoined enforcement of an Act of Congress which Congress has declared to be essential to the preservation of uninterrupted rail transportation in a large region of the country?

2. Does Congress, after concluding that the public interest requires adequate protection of Rock Island employees, have the power to establish the terms upon which the Rock Island, a railroad in reorganization under Section 77 of the Bankruptcy Act, may withdraw its assets from the business of providing interstate rail transportation?

3. Did the District Court abuse its discretion in enjoining an Act of Congress intended to provide immediate protective benefits to needy employees of the Rock Island where there was no showing that either the estate or the creditors of the Rock Island would be irreparably harmed while the parties were complying with an Act which Congress has declared to be essential to the uninterrupted continuation of rail transportation in a large region of our country?

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* Appellant Railway Labor Executives' Association is a voluntary, unincorporated association of the Chief Executive Officers of virtualy all of the standard labor organizations which represent railroad employees. The member organizations of RLEA are listed in Appendix F, attached hereto. All other parties to this proceeding are included in the caption, and are further identified in footnote 3, *infra* at p.6.

4. Did Congress in passing the Rock Island Transition and Employee Assistance Act (RITA), intend to withdraw the remedy of the Tucker Act, 28 U.S.C. §1491, from those who claim that compliance with the directions of RITA would deprive them of property without just compensation?

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Appellees.

On Appeal From The United States District Court For The Northern District Of Illinois, Sitting As A Railroad Reorganization Court

JURISDICTIONAL STATEMENT

This case involves an appeal by the Railway Labor Executives' Association [hereinafter, "RLEA"] from a preliminary injunction issued on June 9, 1980, by the United States District Court for the Northern District of Illinois in which that court, sitting as a railroad reorganization court for the reorganization of the Chicago, Rock Island & Pacific Railroad Co. [hereinafter, "CRI" or "Rock Island"] under Section 77 of the Bankruptcy Act, 11 U.S.C. §205, enjoined the enforcement of Sections 106 and 110 of the Rock Island Transition and Employee Assistance Act [hereinafter, "RITA"], Pub. L. No. 96-254, 45 U.S.C. §1001, *et seq.*

Sections 106 and 110 of RITA, 45 U.S.C. §§1005 and 1008, provided a procedure by which Congress directed the Rock Island to mitigate the harsh consequences which the demise of that carrier was having upon its employees, and the Court preliminarily enjoined enforcement of those provisions because, in its opinion, they were unconstitutional.

OPINIONS BELOW

The District Court delivered an oral opinion when it granted the preliminary injunction on June 9, 1980. That opinion, as well as the order imposing the injunction, are not officially reported; they are attached to this pleading as Appendices B and C, respectively. On June 20, 1980, the court denied a motion by the United States to reconsider its ruling of June 9, 1980, and its unreported oral opinion is attached hereto as Appendix D.

JURISDICTION

This case involves an appeal from an interlocutory order of a United States District Court in which that court, on June 9, 1980, held portions of an Act of Congress unconstitutional, and preliminarily enjoined agencies of the federal government, as well as the Rock Island Trustee, from complying with the commands of Congress in that Act. This Court, appellant RLEA submits, has jurisdiction over this appeal under 28 U.S.C. §1252.

Appellant filed its notice of appeal on June 11, 1980, two (2) days after the preliminary injunction was issued, well within the thirty (30) day time period of 28 U.S.C. §2101(a); a copy of that notice is attached hereto as Appendix E. On August 5, 1980, this Court granted appellant an extension of time to and including September 15, 1980, in which to docket this appeal.

STATUTES INVOLVED

This appeal involves the constitutionality of two (2) provisions of RITA, *i.e.*, Sections 106 and 110, 45 U.S.C. §§1005 and 1008. Appellant has set forth both statutory provisions in Appendix A which is attached hereto.

STATEMENT OF THE CASE

Operating a railroad system in thirteen (13) states in the mid- and southwestern regions of the country which included over 10,000 miles of track and which employed in August 1979 over 8,700 employees, the Rock Island, on March 17, 1975, filed a petition with the United States District Court for the Northern District of Illinois to reorganize under Section 77 of the Bankruptcy Act, 11 U.S.C. §205. That petition was filed after the CRI had experienced several years of a deteriorating financial condition. Thereafter, the CRI continued to operate, albeit under the protection of Section 77, for more than four and a half (4½) years. But, after a lawful strike further damaged its financial posture, the Rock Island ceased all operations on its own in September 1979.

On January 25, 1980, the Trustee was ordered to liquidate the estate because the reorganization court concluded, without the benefit of a report by the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] as required under Section 77(d), 11 U.S.C. §205(d), that the Rock Island was unreorganizable.[1]

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[1] Appellant RLEA has taken an appeal from that liquidation order to the United States Court of Appeals for the Seventh Circuit (No. 80-1353) on the ground, *inter alia*, that a Section 77 reorganization court does not have jurisdiction to order or to control a liquidation of a railroad in reorganization under Section 77. *See, Ecker* v. *Western Pac. R.*, 318 U.S. 448 (1943); *Van Schaick* v. *McCarthy*, 116 F.2d 987 (10th Cir. 1941). That appeal is still pending.

Thereafter, the reorganization court began to authorize certain acts on the part of the Trustee designed to accomplish liquidation of the estate by either abandonment of lines or sales of Rock Island property to interested purchasers. On June 2, 1980, the reorganization court, asserting that since at least its liquidation order of January 25, 1980, the public interest in continuation of the Rock Island has been outweighed by the interests of the creditors in protection of their financial interests, authorized the abandonment of the entire Rock Island system, subject to a delay in abandonment of those lines which the ICC had concluded were essential to the public interest.[2] The court also refused to condition its abandonment order upon a requirement that the carrier provide protections for employees who may be affected by the abandonment, even though Section 17(a) of the Milwaukee Railroad Restructuring Act [hereinafter, "MRRA"], 45 U.S.C. §915(a), by its express terms mandated that such an abandonment order be conditioned.

Shortly after the CRI reorganization court ordered the liquidation of the Rock Island, Congress began to consider legislation to cover the Rock Island situation, including provisions to continue without interruption essential rail services then being provided under 49 U.S.C. §11125, and to assure that Rock Island employees were not left destitute by the cessation of railroad operations. *E.g.*, S. 2253, 96th Cong., 2d Sess; H.R. 6837, 96th Cong., 2d Sess. Title I of the legislation enacted and signed into law on May 30, 1980, as Public

[2] On June 9, 1980, RLEA appealed that abandonment order to the United States Court of Appeals for the Seventh Circuit (No. 80-1788). On August 4, 1980, an appeal by the United States from that order was docketed with the Seventh Circuit, No. 80-2075; those appeals are still pending.

Law No. 96-254 dealt with the Rock Island, and Sections 105 through 110 included provisions intended to assure that Rock Island employees who are unable to secure employment on a permanent basis with rail carriers purchasing Rock Island lines would not be deprived of minimum protections.

Section 106 of the Rock Island Transition and Employee Assistance Act (*i.e.*, Title I of Pub. L. No. 96-254) was patterned after Section 9 of the MRRA, 45 U.S.C. §908, and, as the House report explains:

> [P]rovides that the representative of the Rock Island Trustee and representatives of the Rock Island employees, with the assistance of the National Mediation Board, shall negotiate an employee protection arrangement within ten days of enactment. Should those negotiations prove unsuccessful, the ICC will impose, not later than 30 days after enactment, a fair and equitable arrangement no less protective of the employees than under Section 9 of the Milwaukee Railroad Restructuring Act. The employee protection payments shall be administrative expenses as they were under section 9(d) of the MRRA . . . . The ICC, in imposing protection, shall consider benefits including moving expenses, separation allowances, health insurance benefits and other benefits, subject to the $75 million limitation. Because litigation may result from this provision, the bill provides for an expedited litigation procedure.

H. Rpt. No. 96-839, 96th Cong., 2d Sess. at 22 (1980).

Congress carefully drafted the legislation to provide for an expeditious implementation of an arrangement to protect Rock Island Employees and in the Conference Report on this legislation, the conferees noted in reference to Section 106:

> This section *mandates early implementation* of employee protection to avoid disruption of rail ser-

> vice and undue displacement of employees. The conferees intend that if no agreement is reached within the initial 10-day period and the ICC prescribes an agreement, the bankruptcy court will take whatever actions are appropriate and necessary for the immediate implementation of such agreement, *so that payments to Rock Island employees will be made forthwith, notwithstanding any ensuing litigation concerning such payments. The conferees believe that legislation is essential to provide for an orderly transition.*

H. Rpt. No. 96-1041, 96th Cong., 2d Sess. at 26 (1980) (emphasis added).

After the enactment of RITA, the National Mediation Board proffered its assistance, and over the ten (10) day period scheduled several negotiation sessions. Although representatives of the Rock Island employees attended each session called by the Board, the Rock Island Trustee declined to participate. At first the Trustee asked for a postponement from June 3, 1980, to June 5, 1980, and then on June 4 informed the Board that he would not attend the forthcoming session. On June 6, 1980, the Trustee informed the National Mediation Board that in his view the Act was unconstitutional and he would not attend the next session then scheduled for June 9, 1980. On June 5, 1980, the Trustee, along with the principal creditors and shareholders of the debtor[1] filed a twenty-six (26) page Complaint with the reorganization court seeking both a judgment declaring

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[1] The First National Bank of Chicago and the Continental Illinois National Bank and Trust Company of Chicago, as indentured Trustees, and Henry Crown *et al.*, shareholders. Hereafter, the creditors and shareholders will be referred to as "creditors." The United States of America, the ICC, and the Honorable Neil Goldschmidt were named as defendants. RLEA, an intervenor in the reorganization proceeding, participated as an active party in the hearing on this matter.

the entire Act unconstitutional, and an injunction against its enforcement.

A hearing on the Trustee's and creditors' request for injunctive relief was conducted before United States District Judge Frank J. McGarr sitting as a reorganization court on June 9, 1980, and at the conclusion of that hearing the court ruled that those sections of RITA dealing with an employee protection arrangement (*i.e.*, Sections 106 and 110) were unconstitutional as depriving the estate of property for a public purpose without just compensation, and possibly becasue they were a non-uniform Bankruptcy act. The court, without making specific findings of irreparable harm except concluding that the Act was unconstitutional, issued a preliminary injunction (1) enjoining the ICC from asserting jurisdiction to consider or to impose any employee protective arrangement; (2) enjoining the Trustee from entering into negotiations with labor representatives to arrive at an agreement under RITA; and (3) enjoining Secretary of Transportation Neil P. Goldschmidt from complying with obligations imposed by Section 110(a) of the Act.

On June 18, 1980, the United States filed a motion requesting the court to reconsider its ruling of June 9, 1980, and to vacate the injunction. Appellant RLEA and the ICC supported that motion, but after hearing oral argument on June 20, 1980, the court denied that request. In doing so, the court reiterated its earlier view that Sections 106 and 110 of RITA were unconstitutional for several reasons, but specifically enumerated only one such reason—*i.e.* "any imposition of labor protection by Congress on the Rock Island payable out of the Estate was an unconstitutional taking." Tr. of June 20, 1980, at 59; Appendix D at 22a.

Appellant RLEA filed with this Court on June 21, 1980, an application for a stay of that preliminary injunction, but on June 28, 1980, Mr. Justice Stevens denied that request with a written statement. Appellant RLEA then requested reconsideration of its stay application by the full Court, and on July 2, 1980, this Court, with three (3) Justices dissenting and one (1) Justice abstaining, voted to deny that stay request.

On June 11, 1980, appellant RLEA filed its notice of appeal to this Court and this appeal has followed. The United States on July 9, 1980, also noted an appeal from the preliminary injunction.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. History has shown that conflicts continue to arise over the separation of powers between the various branches of our Government, and this case is another example of that conflict. However, because of the grave national interests which are at stake, it is important that it be this Court which determines whether Congress, or as RLEA submits, the reorganization court has overstepped its bounds.

Shortly after the Rock Island reorganization court in January 1980 ordered that carrier to be liquidated, Congress began to examine the crisis caused by that decision to our nation's rail system, and it concluded, as have both Congresses and the courts for the past half-century, that it was vital to our national interests that Rock Island employees not be left destitute, but, rather, that their interests be considered and be protected by the reorganization court. *See generally,* 126 Cong. Rec. H8619 (September 9, 1980). Congress, appellant RLEA submits, had provided such protections when in passing

Section 17(a) of the MRRA, 45 U.S.C. §915(a), it required the reorganization court to provide adequate protection for employees in authorizing *any* abandonment.

Because of questions which began to develop over whether the reorganization court would comply with that statutory directive, Congress provided in Sections 106 and 110 of RITA a compromise which it believed would assure prompt and certain protection for employees while litigation over the protections afforded by Section 17(a) of the MRRA, was prosecuted. H. Rpt. No. 96-839, *supra*, at 22-23. That compromise was enacted, for as Congress found in Section 102 of RITA the Congressional Findings:

> Sec. 102 (a) Congress hereby finds that:
>
> > (1) uninterrupted continuation of services over Rock Island lines is dependent on adequate employee protection provisions covering Rock Island Railroad employees who are not hired by other railroads;
> >
> > (2) for those Rock Island Railroad employees not hired by other rail carriers, there is no other practicable means of obtaning funds to meet the necessary costs of such employee protection that are assumed by the Rock Island Railroad.
> >
> > (3) a cessation of necessary operations of the Rock Island Railroad would have serious repercussions on the economics of the States in which such railroad principally operates; and
> >
> > (4) premature cessation of services over lines which are the subject of pending purchase application [*sic*] would result in harm to the shipping public and could imperil continuation of vital commuter service.

45 U.S.C. §1001(a). An examination of Section 106 of the Act clearly shows that Congress believed the im-

plementation of an arrangement to protect CRI employees must be accomplished expeditiously; payments to Rock Island employees should "be made forthwith, notwithstanding any ensuing litigation concerning such payments. Conference Report to accompany S.2253, H. Rpt. No. 96-1041, *supra*, at 26.

The District Court, however, had a different view of the balance to be struck between the rights of the public and the rights of the creditors and estate in the crisis confronting the Rock Island, and three (3) days after RITA was enacted, it concluded when it authorized the abandonment of the entire Rock Island that employees were to be left unprotected. It was that conclusion, as well as its conclusion that the public interest was no longer a concern of the Rock Island estate (Appendix D at 18a-19a), which formed the basis for the injunction of June 9, 1980. But by insisting that its view of the unimportance of the public interest in this case was correct, the court has totally frustrated the basic intent of Sections 106 and 110 of RITA, and has undermined the successful transition of Rock Island service which Congress has so carefully planned in RITA.

Appellant RLEA respectfully submits that the very act of declaring such a vital Act of Congress unconstitutional and preliminary enjoining its enforcement without rendering a precisely detailed opinion describing the constitutional errors perceived in that Act, presents a substantial question which warrants plenary review by this Court. Surely federal courts must detail where they believe Congress erred in order that Congress could, if it deems the subject important enough, remedy the problem by new legislation. *See*, 126 Cong. Rec. H8618-19 (September 9, 1980). The open ended nature of the District Court's opinion in this case woefully fails to give that aid.

2. Another reason for granting plenary review in this appeal is the fact that the preliminary injunction in this case conflicts with prior rulings of this Court, in particular the decision in the *Regional Rail Reorganization Act Cases* [hereinafter, "*Rail Act Cases*"], 419 U.S. 102 (1974). It is a well accepted maxim of statutory construction that a court should not declare an Act of Congress unconstitutional unless no other reasonable construction of the statute is possible. *E.g., Rail Act Cases,* 419 U.S. at 134. Moreover, it is but a corollary of that doctrine that where a court may decide a case without reaching the constitutional issue, it should take that approach. *Id.* at 145-46, 158. Those principles, appellant RLEA submits, were totally disregarded by the District Court in this case when it summarily enjoined for constitutional reasons an Act which Congress declared to be essential to our nation's rail transportation system. Also, it did so without carefully examining whether appellant, appellees, or the public would be irreparably injured if the Act were enjoined. That error by itself, appellant RLEA submits, is sufficient to warrant a full review and a reversal of the judgment below. Moreover, the District Court also erred in concluding on the merits that Section 106 and 110 of RITA were constitutionally infirm.

The principal constitutional defect which the District Court believed existed in Sections 106 and 110 of RITA was the requirement in those sections that the Rock Island estate provide protection for its employees. As the court noted: "That Congress believes that it can legislate a $75 million labor protection burden on the assets of the Rock Island comes to me as a startling concept." Tr. of June 9, 1980, at 4; Appendix B at 7a. Since, according to the court, the public interest no longer was a factor to be considered in the Rock Island

reorganization, Congress had no authority to prescribe a protective arrangement to protect employees who were affected by the liquidation of the railroad. *Id.* And if it did require such an arrangement, it could not do so at the expense of the estate. *Id.* at 4-5, Appendix B at 6a-7a.

An immediate and glaring error of that reasoning is that the public interest is still an integral part of the Rock Island reorganization proceeding since the only jurisdiction which that court has over the Rock Island comes from Section 77 of the Bankruptcy Act, 11 U.S.C. §205. It is beyond question that the public interest is an essential ingredient of any action by a reorganization court pursuant to the jurisdiction conferred by Section 77. *New Haven Inclusion Cases,* 399 U.S. 392, 431 (1970). Even though the District Court believes it is liquidating the debtor, Section 77 does not give it that power, especially in the circumstances of this case where it has made no provision for continued rail service (*e.g., In re Lehigh Valley R.,* 558 F.2d 137 (3rd Cir. 1977)), and consequently, it should be clear that the public interest remains a primary concern in the proceeding.

But even accepting *arguendo* the CRI court's erroneous premise for its ruling, it is also beyond question that Congress, in the exercise of its powers under the Commerce Clause (Art. I, §8, cl. 3, U.S. CONST.) has the absolute right to regulate the terms or requirements of entry and exit from interstate railroad operations. *E.g.,* 49 U.S.C. §§10901, 10903. One such requirement which has been well recognized since at least as long ago as the enactment of the Emergency Railroad Transportation Act of 1933, 48 Stat. 211 (1933), is that the interests of employees must be taken into consideration and protected. *E.g., United States* v. *Lowden,* 308 U.S. 225 (1939). That requirement specifically applies to

abandonments of operations by a rail carrier, *e.g.*, *ICC v. Railway Labor Executives' Association*, 315 U.S. 373, 377-78 (1942), and in 1976 that requirement was made mandatory by the Congress in Section 802 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, codified as 49 U.S.C. §10903(b) (2).[4] When Congress in Sections 5(a) and 17(a) of the MRRA, 45 U.S.C. §§904(a), 915(a), gave Section 77 reorganization courts the power to authorize abandonments, it did so with the specific admonition that:

> In authorizing any abandonment pursuant to this section, the court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under [49 U.S.C. §11347] . . . .

45 U.S.C. §915(a).

While the Rock Island reorganization court refused to impose provisions to protect employees when it authorized an abandonment of the CRI system,[5] it made that decision *after* RITA was enacted and its provisions had become effective. Consequently, it cannot validly be maintained that the imposition by Congress of a requirement that the Rock Island provide employee protection was either beyond Congress' powers or in violation of due process since Section 106 merely quantified a potentially larger debt of the estate, and provided a com-

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[4] The Commission, relying upon language in a conference report to that legislation, has concluded that it still retains discretion in an entire line abandonment case to refuse to impose employee protections. *E.g.*, *Wellsville, A. & G. R.—Abandonment*, 354 I.C.C 744 (1978); *but see*. H. Rpt. No. 96-839, *supra*, at 63-66.

[5] The court concluded that Section 17(a), as well as its employee protection requirement, were not applicable to its ruling "confirming" the abandonment of the Rock Island.

promise for a troublesome question which has strong public interest considerations. *See,* H. Rept. No. 96-839, *supra,* at 22-23; *accord, Ecker* v. *Western Pac. R.,* 318 U.S. 448, 468 (1943).

But even if the court was correct that the imposition of the arrangement required by Section 106 of RITA would be a taking for public purposes without compensation, that conclusion does not lead to the further conclusion that the taking is unconstitutional so as to render Section 106 enjoinable. This Court has previously observed that a statute can be saved from unconstitutionality by the Tucker Act, 28 U.S.C. §1491. *E.g., Rail Act Cases,* 419 U.S. at 126-27. And unless Congress has expressly withdrawn that remedy, it should be found to be available if there is a potential constitutional question about the validity of an Act. *Id.* at 126. Since the availability of the Tucker Act is crucial to a conclusion that either the estate or the creditors would be irreparably harmed by RITA, it was encumbant upon the Court to decide that question at the same time that it concluded that the Act was otherwise unconstitutional.

3. A third reason why this appeal presents substantial questions which warrant plenary review is that the court below took the grave step of declaring an Act of Congress unconstitutional without carefully or accurately balancing the equities involved. An examination of the facts in this case shows that the potential harm to appellees from a denial of the injunctive request is not irreparable as a matter of law, and that the court therefore abused its discretion in granting the injunction.

Justices of this Court have recognized before that "statutes are presumptively constitutional and, absent

compelling equities on the other side . . ., should remain in effect pending a final decision on the merits by this Court." *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1352 (1977) (Rehnquist, J.; in chambers); *accord, Williams* v. *Zbaraz*, 442 U.S. 1309, 1312 (1979) (Stevens, J.; in chambers). In this case, appellant RLEA submits, appellees cannot show that there are compelling equities on their side to continue the injunction in effect, and due to the clear injury to the employees represented by appellant and to the public, the injunction should never have been issued.

Appellees Trustee and Creditors have asserted below that an injunction was necessary to prevent the beginning of the process called for by Section 106 of RITA because once underway that process would deny them due process of law by virtue of the expedited review procedures of Section 106(d)(2); and since implementation of the arrangement could not be stayed pending that review, they could be subject to an unconstitutional deprivation of property. Although the Rock Island reorganization court did not enter any specific findings of fact detailing what, if any, irreparable harm required the issuance of an injunction (*see*, Rules 65(b) and (d), Fed. R. Civ. P.), a review of the Court's oral opinion shows that the preceived harm involved both a potential unconstitutional taking (Appendix B at 7a), and a presumed denial of procedural due process by being required to submit to the administrative processes under Section 106(b), and by being denied a right to have the reorganization court examine the arrangement imposed thereby. Appellant RLEA respectfully submits that neither assertion of potential injury amounts to irreparable harm.

Section 106, it is submitted, does not unconstitutionally deprive appellees of their property since

employee protection has always been a potential liability of the estate. But even if it were potentially unconstitutional, the immediate payment of funds for employee protection is not irreparable since Congress has provided that the estate could borrow such funds on the basis of the government's guarantee. Section 110 of RITA, 45 U.S.C. §1008. If it is determined subsequently that the priority accorded to the obligations under Sections 106 and 110 are unconstitutional, the estate and the creditors will not be harmed because "if it turns out that the $75 million of claims have been given an unconstitutional preference, then the government's loan will be relegated to its proper priority under the reorganization plan." *In re Chicago, M, ST.P. & P. R.*, N.D. Ill. No. 77 B 8999, Order No. 286 at 9. Moreover, if as appellant submits, the Tucker Act remedy is also available, it is legally impossible for the Trustee and creditors to allege irreparable harm from an unlawful disbursement of funds during a processing of an appeal under Section 106(d)(2) of the Act.

Appellees fears that they will be denied procedural due process by being required to allow the ICC to consider an appropriate employee protective arrangement under Section 106(b) are, to say the least, frivolous. It is axiomatic that being required to submit to an administrative process does not amount to irreparable harm. *E.g., Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1 (1973); *accord, New Motor Vehicle Board,* v. *Orrin W. Fox Co., supra.* Moreover, it is entirely consistent with our judicial system to require appellees to submit to those processes during an appeal. *E.g., New York Times Co.* v. *Jascalevich,* 439 U.S. 1304 (1978) (Marshall, J., in chambers). Thus, appellees could not show that they would suffer any harm whatsoever by a denial of their injunctive request,

thereby permitting the ICC to assume jurisdiction under Section 106(b) to begin its deliberations, and then to allow appellate review under Section 106(d)(2).

Also, the District Court's conclusion at page 12 of its oral decision of June 9, 1980 (Appendix B at 11a), that irreparable harm would be sustained by allowing the expedited appellate review procedures of Section 106(d)(2) and the no-stay provisions of Section 106(d)(1) to be triggered, is without merit. In the first place, Congress intended any question over the legality of Section 106 to be resolved expeditiously and it cannot be said at this stage of the proceedings that such an expedited appellate period of sixty (60) days will deprive any party of due process, especially since the District Court believed it could make such a determination in only four days. *E.g., Rail Act Cases,* 419 U.S. at 158; *Yakus* v. *United States,* 321 U.S. 414 (1944). And secondly, as a practical matter, it is very unlikely that the administrative processes necessary to promulgate regulations under Sections 106(e)(1) and 114 of the Act, and to fund the arrangement under the loan guarantee procedures of Section 110 will be concluded much before an appellate decision is rendered. A similar loan guarantee procedure under Sections 9 and 15 of the MRRA for the Milwauukee took fifty-six (56) days from the date the application was received until the guarantee agreement was entered into. Since it took that long to fund a similar arrangement with a cooperative and willing Trustee, it is very probably that it will take at least as long, if not longer, in this case. Any payments in the interim from the corpus of the estate, of course, would be recoverable under the Tucker Act if it is subsequently determined that the arrangement was unlawful.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

RESPECTFULLY SUBMITTED,

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Attorneys for Railway Labor Executives' Association

Dated: September 15, 1980

APPENDIX

APPENDIX A

Portions Of Rock Island Transition And Employee Assistance Act, Pub. L. No. 96-254

1) 45 U.S.C. §1005

Employee Protective Agreement

Sec. 106.(a) No later than 10 days after the date of enactment of this Act, in order to avoid disruption of rail service and undue displacement of employees, the Rock Island Railroad and labor organizations representing the employees of such railroad, with the assistance of the National Mediation Board, may enter into an agreement providing protection for employees of such railroad who are adversely affected as a result of a reduction in service by such railroad. Such employee protection may include, but need not be limited to, employee relocation incentive compensation, moving expenses, and separation allowances.

(b) If the Rock Island Railroad and the labor organizations representing the employees of such railroad are unable to enter into an employee protection agreement under subsection (a) of this section within 10 days after the date of enactment of this Act, the parties shall immediately submit the matter to the Commission. The Commission shall impose upon the parties by appropriate order a fair and equitable arrangement with respect to employee protection not later than 30 days after the date of enactment of this Act, unless the Rock Island Railroad and the authorized representatives of its employees have by then entered into a labor protection agreement. For purposes of this subsection, the term "fair and equitable" means no less protective of the interest of employees than protection afforded under section 9 of the Milwaukee Railroad Restructuring Act (45 U.S.C. 908), subject to the limitations set forth in section 110 of this title.

(c) If an employee protection arrangement is imposed by the Commission under subsection (b) of this section, the bankruptcy court shall immediately authorize and direct the Rock Island Railroad trustee to, and the Rock Island

Railroad trustee and the labor organizations representing the employees of the railroad shall, immediately implement such arrangement.

(d)(1) An order of the Commission under subsection (b) of this section may not be stayed by the Commission or by any court, and an order of the bankruptcy court under subsection (c) of this section may not be stayed by any other court.

(2) Any order described in paragraph (1) of this subsection may be appealed only to the court of appeals of the United States having jurisdiction to review decisions and orders of the bankruptcy court. Any such appeal to such court of appeals shall be filed within 5 days after the date of entry of the order of the Commission or the bankruptcy court, as the case may be, and such court of appeals shall finally determine such appeal within 60 days after the date such appeal is filed. No determination by the court of appeals under this subsection may be reviewed in any other court.

(e)(1) Any claim of an employee for benefits and allowances under an employee protection agreement or arrangement entered into under this section shall be filed with the Board in such time and manner as the Board by regulation shall prescribe. The Board shall determine the amount for which such employee is eligible under such agreement or arrangement and shall certify such amount to the Rock Island Railroad for payment.

(2) Benefits and allowances under such agreement or arrangement entered into under this section shall be paid by the Rock Island Railroad from its own assets or in accordance with section 110 of this title, and claims of employees for such benefits and allowances shall be treated as administrative expenses of the estate of the Rock Island Railroad.

(f) The first sentence of section 7(b)(7) of the Railroad Retirement Act of 1974 (45 U.S.C. 231f(b)(7) is amended by striking out "and the Milwaukee Railroad Restructuring Act"

and inserting in lieu thereof ", the Milwaukee Railroad Restructuring Act, and the Rock Island Railroad Transition and Employee Assistance Act".

2) 45. U.S.C. §1008

OBLIGATION GUARANTEES

Sec. 110(a) The Secretary, under the authority of section 511 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 831), shall guarantee obligations of the Rock Island Railroad for purposes of providing employee protection in accordance with the terms of any employee protection agreement or arrangement entered into under section 106 of this title.

(b) Any obligation guaranteed pursuant to this section shall be treated as an administrative expense of the estate of the Rock Island Railroad.

(c) The aggregate unpaid principal amount of obligations which may be guaranteed by the Secretary pursuant to this section shall not exceed $75,000,000.

(d) The total liability of the Rock Island Railroad in connection with benefits and allowances provided under any employee protection agreement or arrangement entered into under section 106 of this title shall not exceed $75,000,000.

(e) Except in connection with obligations guaranteed under this section, the United States shall incur no liability in connection with any employee protection agreement or arrangement entered into under section 106 of this title.

(f) Section 511(g) and section 516 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 831(g) and 836) shall not apply to any obligation guaranteed under this section.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF:

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,
Debtor.

Partial Transcript Of Proceedings

had in the above-entitled matter before the HONORABLE FRANK J. MCGARR, one of the Judges of said Court, in his courtroom, in the United States Courthouse, Chicago, Illinois, on Monday the 9th day of June, 1980, at the hour of 10:00 o'clock a.m.

THE COURT: I don't think a response will be necessary, in light of the time, as we've gone well into the lunch hour. I have a matter at 2:00 o'clock that will take all afternoon. I indicated at the conclusion of the argument I would indicate my ruling on the application filed by the Trustee and the creditors this morning, it's my intention now to do so, if I can get the many notes I made in some form of order.

It's of no news to anybody here interested in this case that for well over four years, closer to five years, I guess, I have been trying to balance the public interest against the rights of the creditors, that I have sanctioned the continued operations of the Rock Island towards the end of an anticipated and hoped for reorganization. Events indicated down the line, and I accepted as inevitable, the fact that that effort had and would continue to fail, and therefore recently, in view of that conclusion, I ordered the termination of operations and the abandonment of the Rock Island operation. The Commerce Commission agreed with me, and after hearing that, I entered the final order, and we do not now have before us, for any consideration, an operating railroad.

The basic thrust and historical mission of the Commerce Commission is to oversee the operations of railroads, not

their liquidation, and to oversee the terms and conditions in this case of contracts entered into with other railroads to continue to operate segments of the Rock Island, if any such agreement is reached. This jurisdiction, however, is basically over the new operating entity, the Rock Island not being an operating entity.

I have before me today an application for a declaratory judgment that has to do with a statute recently enacted and an attack upon its constitutionality, and in argument there has been adverted to, and I have in front of me, the text of the preamble to that statute, the Rock Island, Section 102, and the preamble indicates the pursuit of Congress of the interest of seeking the uninterrupted continuation of services over Rock Island lines, dependent as it is, and I'm not reading, I'm paraphrasing, an adequate employee protection provision, covering Rock Island Railroad employees who are not hired by other railroads.

There is in that, and the following three paragraphs of the preamble, a basic illogic, a basic contradiction which I'm at a loss to understand. What the statute addresses itself to is labor protection for those employees who will not be absorbed by whatever segments of the Rock Island are continuing to operate, and therefore the purpose of uninterrupted continuation of services over Rock Island Lines, as part of the preamble to this statute, remains to those persons arguing it, and to me, something of a mystery. The important thing to remember is that whatever public purpose and public interest there remains in this case is the problem of the other carriers and the Interstate Commerce Commission and the on-going supervision by the I.C.C. of the operations of the other carriers over Rock Island Lines that they may have acquired. But, the Rock Island is a bankrupt corporation with no more operations, nothing left but assets and creditors and liquidation. Whatever obligations it may have to labor, it must arrive out of a contract that it had with labor, and any appropriate claims of labor under existing bankruptcy law is under the Railroad Retirement Act or any other statute which

operates to fix the rights of labor. There are pension rights, I assume, there may be wage claims that can be resolved. But, these are all based upon existing law, existing rights, existing contracts, and that Congress believes that it can legislate a $75 million labor protection burden on the assets of the Rock Island comes to me as a startling concept. That the Government will lend or the FRA will lend the $75 million is irrelevant in face of the fact that obviously that becomes a claim against the Estate in derogation of the rights of the creditors in whatever assets the Estate now has.

I'm not aware that it has ever been held that Congress can single out a private industry in bankruptcy and legislate for this single company only labor-management rights. I'm aware that in the Milwaukee Act something of that nature seems to have been done. I'm not sure that I agree with Judge McMillen and his conclusions, but neither do I disagree, because his situation is so different than the one before me that I don't find it analogous. The Milwaukee continues to operate, the Milwaukee has problems the Rock Island doesn't have, and the Milwaukee is in a situation the Rock Island is not in.

It seems to me clear, without the necessity of a great deal of argument, that the Rock Island Act, which is the subject of our deliberations today, is an unconstitutional taking, an unconstitutional deprivation of the property rights of the creditors. It seems to be thus in two respects at least, and probably more, but the labor protection aspect of it, which has been argued today at some length, and in addition, the curious procedural deprivation of the ordinary rights of adjudication and appeal of decision affecting the property rights of creditors in a bankruptcy case.

The labor protection scheme, however, is central to the legislation, and its infirmities are sufficient basis for the ruling that I intend to make today. But, while this is true, there are other aspects of the legislation that I have adverted to of dubious constitutionality. One I have mentioned is the strangely trunkated appellate procedure. The second, in-

cluding the deprivation of the Trustee and the Court and the creditors of their control over and their rights in the Commuter Service for the extended period of two years. This and other problems remain for further consideration. However, and as I've said, the labor protection plan is the central issue of this morning's argument and this morning's determination, and it is enough to warrant the intrustion [*sic*] of the Court into this implementation of this statutory program on constituional grounds.

I have no lack of faith in the ability of the Seventh Circuit to decide the constituional issues here. My reservatins, however, are as to the procedural anomalies which this statute emobidies, setting the matter, apparently in the interest of speed and expedition, upon an exceedingly fast track, which puts a bankruptcy matter in the hands of the I.C.C., expert by definition only in terms of railroad operations, and bypasses the Court which has the primary jurisdiction over bankruptcy matters. The Seventh Circuit, in any event, will review this matter one way or another, and I would not wish it otherwise, but it will only be after an order of this Court barring the intent of this legislation to impose this significant obligation on a bankrupt estate with a statute by-passing the jurisdiction of the Bankruptcy Court in which the case is pending.

Let me comment for a moment on some of the arguments that have been made in opposition to the application of the creditors and the Trustee. Mr. Broadley and Mr. Rush have argued that it would be appropriate for the Court to let the Trustee respond to the I.C.C.'s request for information, allowing the Commerce Commission to thus formulate the issues and work out a labor protection plan which in the argument of Mr. Broadley, I think it was, might be acceptable to the Court and the Trustee. I know that was Mr. Rush's argument. It might even be much less than the $75 million, it might be $50 million or $25 million. The issues [*sic*] is not whether the I.C.C. can arrive at a labor protection plan which the creditors and the Trustee could live with, even

if that plan were to cost the Estate only $1 million. The issue is whether ab initio, the concept of a compelled labor protection plan, paid for out of the Estate, whatever the plan, has any constitutional sanction. We don't have to wait for an I.C.C. determination of the details of the plan to determine that issue.

Mr. Broadley has argued the Lowden case, the Old Rock Island case, a reorganized railroad continuing operations, and that, of course, that phrase, "continuing operations," is the reason why the Lowden case is not applicable here. In its continuing operations after its earlier reorganization, those continuing operations invoked the continuing jurisdiction of the Commerce Commission. The uniqueness of the situation here is that the Rock Island is not a railroad corporation any longer, it's not an operating railroad, it's a corporation in the business of liquidating real estate and equipment and paying off creditors. The environment of labor protection decisions and precedent and all of the Court's decisions and precedent flowing therefrom has always been the environment of an operating railroad, and that is singularly the environment we no longer have here.

Mr. Clarke argues that there is no more public interest, or there is no more public interest here because, at least within the discretion of the Court, because the legislature, the ultimate repository of decisions on public interest, has spoken and decided what the public interest is. If Congress sees public interest, of course, Congress may serve that public interest by appropriate legislation which does so with public funds. One of the central issues in this case is and always has been and will be and will continue to be to what extent the private sector, here the creditors and the bondholders, can be saddled with the public interest. Congress may determine public interest, but Congress may not take private property to serve the public interest.

I find that we have an emergency here, there is irreparable harm to the Rock Island and the creditors if this procedure mandated by the Rock Island Act goes forward,

that the probability of determination of unconstitutionality of this Act after more mature consideration and deliberations is exceedingly great, and that all the statutory and traditional requirements for emergency relief have been met. The emergency relief sought in the petition before me in Paragraph 1 is a temporary restraining order and a preliminary injunction restraining the Commission from asserting jurisdiction to consider or impose labor protection arrangements as provided by the Rock Island Act; an order on the Trustee not to enter into these negotiations as provided by the Act and requested by the Commerce Commission; and a preliminary injunction restraining the United States Secretary of Transportation from going ahead with the statutorily authorized $75 million loan and consequent obligations on the Rock Island that would flow out of the making of that loan.

Because of the apparent unconstitutionality of this Act, I think this relief is warranted, and its effectuation and implementation must be enjoined, and therefore I will enter an order granting the prayers for relief that I have just summarized in the petition of the Rock Island Railroad, Trustee and the creditors. This is a preliminary injunction, I see no need for a temporary restraining order. I think in the issue of constitutionality of an Act, which we can all read and argue, a temporary restraining order is not necessary and a preliminary injunction is the order I intend to enter. This, among other things, opens the avenue of appealability, which I think is probably desirable in this case.

I will continue the matter for further argument and further report on the preliminary injunction and for a determination of whether, after I hear whatever additional you have to present, it should be transmuted into a permanent injunction, a final injunctive order and will grant some time for that. I would expect, however, that before that time there will be a movement in the direction of the Court of Appeals, which is why I have made it a preliminary injunction and an appealable order.

I think the way to finalize this is to draw an order which merely contains the prayers for relief in the plaintiff's motion for a preliminary injunction, which I have indicated I'm ready to grant, so I will merely dictate an order which will be available to you gentlemen before the end of the day embodying those three requests for relief and putting them in order form rather than in prayer form.

Is there anything further, gentlemen, that remains to be done?

MR. CLARKE: Your Honor, there's one matter, and that's a question of whether or not in light of the fact that there is no money needed from the Estate for the next 20 days at least, that your Honor stay your order at this time to allow the Interstate Commerce Commission to consider the issue under Section 106(b) of the Act.

THE COURT: Well, actually that's been the thrust of the argument, Mr. Clarke, and Mr. Broadley, Mr. Rush having argued that no harm will be done by the implementation of this Act, and I have not agreed with that, I don't share their views on the subject. I think that the Act is designed, despite argument to the contrary, to take jurisdiction over this matter away from the Bankruptcy Court, that the Commission is to make its determinations appealable only to the Court of Appeals, that I have no role in that and I think that's one of the unconstitutional aspects of the statute. It has been argued that when all of this has been done, the Trustee will have to come to me for an order approving whatever it is that the Commerce Commission has told him to do. I do not so read the Act, I don't think that's what it says, and therefore to grant your request would merely be to allow to go forward what I have just enjoined, and therefore I deny that motion.

Mr. Broadley, what—

MR. BROADLEY: I was just going to join him in a motion for a stay.

THE COURT: I'll deny the motion for a stay. Gentlemen, I'll get an order out as quickly as I can so all of you have something to go to the Court of Appeals with.

Counsel, you arrived belatedly and you haven't heard most of this. What have you got today?

MR. SCHNEIDERMAN. Your Honor, as I read the draft T.R.O. that was in the papers that we received on Friday afternoon, and as I heard your Honor's statement of what the order would be, do I understand that there is nothing in that order, either requested or entered, that effects the Commuter Service immediately?

THE COURT: That's correct, counsel, I adverted to the fact that that aspect of the statute might be subject to some further scrutiny, but there's not [*sic*] order affecting the Commuter Service entered at this time.

MR. SCHNEIDERMAN: Thank you, your Honor.

THE COURT: Thank you. That will be all, gentlemen.

(WHICH WERE ALL OF THE PROCEEDINGS HAD IN THE ABOVE-ENTITLED MATTER ON THE DAY AND DATE AFORESAID.)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 B 2697

In the Matter of

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, *Debtor,*

WILLIAM M. GIBBONS, as Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; and HENRY CROWN, ET AL., *Plaintiffs,*

v.

THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; AND NEIL GOLDSCHMIDT, United States Secretary of Transportation, *Defendants.*

PRELIMINARY INJUNCTION

This matter is before the court on the joint motion of the trustee and creditors of the estate of the Chicago, Rock Island and Pacific Railroad Company. The trustee and creditors have filed a complaint for a declaratory judgment and injunctive relief declaring the Rock Island Railroad Transition and Employee Assistance Act ("the Rock Island Act") (a copy of which is found in H.R. Rep. No. 96-1041, _____Cong. Rec.-House, H3875 (May 20, 1980)) unconstitutional and enjoining its enforcement. The court has reviewed the complaint and motion and their supporting documents and memoranda. In addition, the court has heard arguments of all interested parties.

Pursuant to the requests for relief in the written filings and the arguments of counsel, the court made oral findings from the bench at the conclusion of the arguments heard this

day. Those findings need not be restated here. However, pursuant thereto, the court orders the issuance of a preliminary injunction:

1) preliminary enjoining the Interstate Commerce Commission from asserting jurisdiction to consider or to impose any labor protection arrangement or obligation under the Rock Island Act; and

2) preliminarily enjoining the Trustee, William M. Gibbons, from entering into negotiations respecting any labor protection agreement and from implementing any such labor protection agreement under the Rock Island Act; and

3) preliminarily enjoining the United States Secretary of Transportation from requesting, approving or guaranteeing any loan or obligation on the estate of the Chicago, Rock Island and Pacific Railroad Company under the provisions of the Rock Island Act.

ENTER:

FRANK MCGARR
United States District Judge

Dated: June 9, 1980

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 B 2697

IN THE MATTER OF:

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,
Debtor.

TRANSCRIPT OF PROCEEDINGS ON MOTION TO RECONSIDER PRELIMINARY INJUNCTION

had in the above-entitled matter before the HONORABLE FRANK J. MCGARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, the 20th day of June, 1980, at the hour of 10:00 o'clock a.m.

[Pages 49-59]

THE COURT: The circumstances of this case, in its leaping from crisis to crisis, which seems to be its history, has frequently compelled the litigants to come in, as they did earlier this week, and also as they did last week and today, in order to address emergencies where there is very little time involved, and that has necessarily compelled me to respond in kind, so that I'm constantly issuing opinions orally from the bench after listening to arguments of counsel and after a brief chance, usually overnight, to read some of the very excellent briefs that I've been supplied with.

It occurs to me that I should be embarrassed that every record that goes to the Court of Appeals, instead of presenting that I would hope to be my reasoned and literate opinion, is going up sort of off the cuff on findings and conclusions that the circumstances mandate. But, I guess that's the way it has to be.

In order to illuminate, as best I can, the reasons for the ruling which I intend to announce on this motion, I'd like to

make some general comments both on the background of the issue and the issues themselves as they're raised.

I did this the last time, I don't know how well it turned out, but, as I said, the exigencies of time are such that it seems to be the best way to do it.

I've heard a lot of reference today, and always in this case, to the public interest, and Mr. Clarke now argues that it was in the public interest to avoid the harsh consequences upon those terminated employees of the Rock Island which he sees implicit in my order. And it's the argument of the Government that the public interest, which lies generally in the capable hands of the Commerce Commission, is where the public interest should remain and that they should obey the mandate of Congress and implement the plan which Congress so obviously in the public interest wants them to do.

The creditors have listened to the public interest argument for five years and I imagine they grew fairly tired of it fairly early in the game, because, as always, I have tried in this case to balance the public interest against the private rights of the creditors, and one must do that in a case involving a public utility such a railroad, and which one never does in any other type of a bankruptcy case because it's so extraordinary that it can be argued that the private right of contract can be effected [*sic*] by the public interest to the extent that it has been in this case.

But, the public interest has many aspects. There was always, in the long life of this case, a strong public interest in the continued operation of the Railroad. We came to a time in the case when even the Commerce Commission abandoned that, as did I.

There has always been an employees' interest. No court ever takes lightly the signing of an order, the issuance of an order that threatens unemployment of a very large number of people, so the employees' interest has been determinative and paramont, and that combination of the public interest and the employees' interest gave the Rock Island five years of

operation and the employees five years of employment, which had a different view been taken of the public interest vis a vis the creditors' interest, they might not have had.

As to the creditors' interest, which is contrary to the public interest in this case, we have reached that stage in the administration of the Rock Island where since it's no longer an operating Railroad, it's the creditors' interests that are now paramont and and must be served.

I'd like to characterize those creditors for a moment. We are tempted to think of the creditors in this case, because they have been active in the case as banks and bondholders and so forth, but my desk is piled high with letters that I have been receiving for many, many months from small businesses and small taking authorities and school districts and from all through the Middle West and the area that the Rock Island serves, telling tales of extreme hardship that have been occasioned by the failure and inability of the Rock Island to pay its bills. These are not giants, they're not banks. They're people upon whom the hardships of the abandonment of the service of the Rock Island and its bankruptcy falls every bit as harshly as the same problems fall on the employees.

What I'm really trying to say, I suppose, is that everyone is this case, as is natural and as is human, approaches it from a single point of view, and I am charged with and have tried hard to see every issue in this case in the light of all of these interests and points of view which I have just discussed.

The statute that we're dealing with today, the Rock Island Transition Act, to give it a shorthand name, exudes concern for expedition, and it is in that atmosphere that this entire proceeding concerning it has taken place. We have moved rapidly, we have tried to do things rapidly and set up possibilities of appeal rapidly for the reason that the issues are vital and important and all these interests are involved and rapid determination of what must be determined seemed to be in order.

In the order that is the subject of today's petition, I did not, in so many words, adjudicate the unconstitutionality of the Rock Island Transition Act, although my remarks indicated that I certainly believed that it was probably that that would be the ultimate conclusion of the Court were we to go down the route to the final injunctive order. But, I did enter a preliminary injunction prohibiting its implementation on the grounds that we had a genuine emergency, that we had irreparable injury and that we had a reasonable probability of the plaintiffs' success on the arguments as to the unconstitutionality of the Act, in both its substance and in the procedures which it set up.

The unconstitutional aspect of the taking of private property to fund a legislatively created special benefits program for the terminated employees remains, in my mind, after all the argument that I have heard today, still the most single valid constitutional argument addressed to the Rock Island Transition Act. The Rock Island as an operating railroad was suffused with the public interest. But, the Rock Island as a non operating former railroad has lost that character, and therefore, Congress, their approach to it, to the public interest seems to me to misapprehend the fact that what they are dealing with is a private business with a lot of creditors which own some property and which is being liquidated for the benefit of creditors, and that it is not an operating railroad and that the public interest is no longer paramont and that the employees of the railroad, regrettable as it is, are former employees of the Railroad.

Among the rationals that have been developed to justify Government intervention into railroading over the years has been the public interest and peaceful labor relations, and the public interest in the necessity to keep an operating railroad operating. The operating railroad aspect is now gone as a factual basis for the interest of Congress, and if Congress had a sufficiently legitimate public interest in peaceful labor relations, as it asserts, and as it has been argued, as a foundation for what it has done, nothing justifies Congress satisfying the

public interest in peaceful labor relations by the taking of private property. The public interest, if it is a real public interest, must be served by public funds.

Mr. Clarke has argued that the money should be paid, the money provided by Congress and by this Act to come from this Estate, that it should be paid to the employees while the legal process goes foreward, and he argues that with some considerable persuasion. But in truth, the argument that the funds, if improperly paid, are recoverable under the Tucker Act is a specious argument and if the money is paid to the employees while the legal processes go foreward and if the constitutionality of the Act, or my decision on it, was correct, there is no doubt that there has been irreparable harm to the Estate of the Rock Island.

Neither is it certain in my mind that as a matter of law that I have the final and total control over the disbursement of the funds, as the Government argues, and therefore, I cannot accept that argument as a reliable predicate for the Court's conclusion that there is no irreparable harm possible in this case, because ultimately I will have the last say as to the disbursement of the funds.

With everybody concerned with expedition and everybody arguing for speed, it seems to me that it doesn't matter very much whether the constitutionality of this Act, which is the basic issue we're all concerned with, is adjudicated in the context of an appeal from my order of a week or so ago, or, as Mr. Rush would have it, after the I.C.C. implements the order and the Rock Island comes to me for an authorization to disburse the funds, which I might be expected to deny if I had the same opinion on constitutionality then as I do now. Or, as Mr. Clarke argues, that after the I.C.C. implements the program and gets set to disburse the funds, that if we handle the appeal expeditiously enough, we may get an order out the Appellate Court before we get the money out of the Rock Island.

All of those programs and all of those paths lead to the same conclusion, and that is the absolute necessity in the present posture of this case for an appellate determination of the validity of my tentative preliminary conclusion that the Act we are discussing in unconstitutional, and in a pragmatic way, it seems obvious to me that the best way to handle that is in an appeal from the order which I have already entered. The fastest way to resolve it is also in that appeal, and I suppose that's why it's the best way.

It is argued, and the Government is understandably concerned that there is confustion as to where that appeal should go, do we have a Seventh Circuit matter, or do we have a Supreme Court matter. I must confess that the issue is confusing to me and I'm not certain, although I'm sure that you gentlemen has given it much more study and thought than I have.

This is a problem created, however, by the Act itself, as I view it, in its attempt to tamper with the ordinary appellate process, and I say that Congress having created this problem, it leaves me no avenue to resolve it.

In summary, I think since Congress desired expedition here, I have raised questions as to the constitutinality of the legislative plan. The objectors say that there is no irreparable harm, and I disagree with them. If the Act is unconstitutional now, it will be no less unconstitutional after the I.C.C. implements its plan or after the funds are disbursed, if that's the way that it turns out, and I assume, therefore, that expedition is best served by an appeal from the order that I entered most recently and to allow the appellate determination from there.

So, with some considerable expression of sympathy for the employees of the Rock Island, and concern, and while I don't expect them to accept this, since nobody believes that you tell them something they don't want is for their own good, that even from the employees' point of view the most expeditious course is the one that I have just described and I have just announced.

Therefore, the motion of Messrs. Broadley, Rush and Clarke, or the motion joined in by all of them to vacate the injunctive order of June 9th is denied.

I guess that leaves you on your way to whatever court of appeals you decide you're going to, gentlemen. At least I hope you stay in touch with each other so you meet in the right court.

That will be the order on today's hearing.

MR. CLARKE: Your Honor, would it be possible to just ask one or two questions for clarification?

THE COURT: I'll do my best.

MR. CLARKE: Your Honor, am I correct in concluding that your Honor has concluded tentatively and it's that finding, the tentative finding of law that is the basis of your injunction that the statute is unconstitutional insofar as it requires the taking from the Estate?

THE COURT: It is unconstitutional for more than one reason, and that's one of them.

MR. CLARKE: So we do have a finding on the constitutionality?

THE COURT: Yes. All right, gentlemen—

MR. RUSH: Might I ask a question also, your Honor?

THE COURT: All right.

MR. RUSH: There's been so much argument about it that it becomes a matter of increasing concern as to whether in your June 2nd order you did in fact, as has been argued, intend to rule that the imposition of any labor protection on the Estate could not be done constitutionally, or whether—I guess I simply understood it as you simply held it wasn't required under Section 17 of the Milwaukee Restructuring Act.

THE COURT: I held originally that it was not required under Section 17 of the Milwaukee Restructuring Act. I added, and you have to always bear in mind that it was in the context of the ruling on an application for preliminary relief,

that it was my view that it was highly probable that the final outcome of the case would be that any imposition of labor protection by Congress on the Rock Island payable out of the Estate was an unconstitutional taking.

MR. RUSH: Thank you, sir.

THE COURT: All right, gentlemen.

(Which were all of the proceedings had in the above-entitled matter on the day and date aforesaid.)

APPENDIX E

In The United States District Court
For The Northern District Of Illinois
Eastern Division

No. 75 B 2697

In The Matter Of

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,
Debtor.

In Proceedings for the Reorganization of a Railroad

Notice Of Appeal

Notice is hereby given that the Railway Labor Executives' Association, an intervenor herein, appeals to the Supreme Court of the United States from a Preliminary Injunction issued at 4:30 p.m. on June 9, 1980, by the United States District Court for the Northern District of Illinois sitting as a Regorganization Court for the Property of the Chicago, Rock Island & Pacific Railroad Company, by which the court, haing declared an act of Congress unconstitutional, enjoined the Interstate Commerce Commission, the Trustee and the Secretary of Transportation from performing their duties under Sections 106 and 110 of the Rock Island Transition and Employee Assistance Act, Pub. L. No. 95-254 [*sic*] (signed May 30, 1980). This appeal is being taken pursuant to 28 U.S.C. §1252.

JOHN O'B. CLARKE, JR.
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(202) 296-8500

Attorneys for Railway Labor executives' Association

Dated: June 11, 1980

Certificate Of Service

I hereby certify that I have this day caused to be served a copy of the foregoing Notice of Appeal by mailing copies thereof with first-class postage prepaid and properly addressed to all parties on the Official Service List.

Dated at Washington, D.C., this 11th day of June, 1980.

JOHN O'B. CLARKE, JR.
John O'B. Clarke, Jr.

APPENDIX F

List of RLEA Member Organizations

American Railway Supervisors Association
American Trian Dispatchers Associaion
Brotherhood of Locomotive Engineers
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen
Brotherhood of Railway, Airline and Steamship Clerks
Brotherhood Raiway Carmen of the United States and Canada
Hotel & Restaurant Employees & Bartenders International Union
International Association of Machinists and Aerospace Workers
International Brotherhood of Boilermakers and Blacksmiths
International Brotherhood of Electical Workers
International Brotherhood of Firemen & Oilers
International Longshoremen's Association
International Organizations of Masters, Mates and Pilots
National Marine Engineers Beneficial Association
Railroad Yardmasters of America
Railway Employes Department, AFL-CIO
Sheet Metal Workers' International Association
Seafarers International Union of North America
Transport Workers Union of America
United Transportation Union

Office-Supreme Court, U.S.
FILED
JUL 22 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-415 and 80-1239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *Appellant*,

v.

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island & Pacific Railroad Company; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; HENRY CROWN, ET AL.; UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; and ANDREW L. LEWIS, JR., Secretary of Transportation, *Appellees*.

Consolidated Appeals From The United States District Court For The Northern District Of Illinois And From The United States Court Of Appeals For The Seventh Circuit

---

JOINT APPENDIX

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Counsel for Appellant

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Counsel for Appellee Trustee

(Counsel for Other Appellees Listed On Reverse Page)

NO. 80-415, APPEAL DOCKETED SEPTEMBER 15, 1980
PROBABLE JURISDICTION POSTPONED APRIL 27, 1981
NO. 80-1239 APPEAL DOCKETED JANUARY 21, 1981
PROBABLE JURISDICTION NOTED APRIL 27, 1981

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Selected Docket Entries in

N.D. Ill. No. 75 B 2697

In re Chicago, Rock Island & Pacific Railroad Co., debtor

UNITED STATES DISTRICT COURT

N.D.Ill. No. 75 B 2697

3-17-75 FILED PETITION OF CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD IN PROCEEDINGS FOR REORGANIZATION OF A RAILROAD UNDER SECTION 77.

• • •

3-18-75 Enter order dated March 14, 1975.

Ordered that in the event that the Chicago Rock Island files a petition in bankruptcy, the Clerk is hereby directed to assign case to Hon. Frank J. McGarr, Dist. Judge—DFT—Exec. Com.

• • •

3-18-75 Enter order dated March 17, 1975.

Enter order *No. 1* that petition is approved as properly filed under Section 77 of the Bankruptcy act (11 U.S.C. Sec. 205). Debtor is authorized to operate pending further order of Court. Debtor shall close its present books as of midnight on March 16, 1975 and open new books as of 12:01 a.m. on March 17, 1975. Statement to be filed May 16, 1975 and within 60 days thereafter. Parties are restrained until further order of Court. Hearing set for March 28, 1975 at 2:00 P.M. for the appointment of one or more Trustees of the Debtor—Draft—McGarr, J. Mailed notices 3-18-75. Y

• • •

3-31-75 Enter order dated March 28, 1975.

Enter order *No. 3,* appointing William M. Gibbons of 33 N. Dearborn Street, Chicago, Illinois as Trustee. Bond of Trustee is fixed at $100,000.00—Draft. Embargo date is extended to May 15, 1975—McGarr, J. Mailed notices 3-31-75. Certified—copy to ICC.

• • •

3-28-75 Filed appearance of Railway Labor Executives Assn., et al. and that of William G. Mahoney as attorney.

3-28-75 Filed affidavit William G. Mahoney, pursuant to Rule 39.

3-28-75 Filed Motion of Railway Labor Exec., Association, The Congress of Railway Unions, The Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers to intervene.

3-31-75 Enter order dated March 28, 1975.

Enter order allowing, intervention of Railway Labor Executives Association, Congress of Railway Unions and Brotherhood of Railway Clerks, etc.—Draft—McGarr, J. Mailed notices 3-31-75. Y

• • •

9-10-79 Filed 9-6-79 Motion of Indenture Trustees and Intervenors Crown et al. for an order directing Trustee to cease freight operations and to commence liquidation of debtors estate. P

• • •

9-10-79 Filed 9-6-79 Response of Intervenors Crown et al. to Trustees report for 1978 and four months 1979. P

• • •

9-13-79 Enter order dated 9-10-79: Conference held. Trustee and any other parties are given until October 19, 1979 to respond to motion of Indenture Trustees and Intervenors Crown et al. for an order directing the Trustee to cease freight operations and to commence liquidation of the Debtors Estate. Trustee in addition to filing his response to file petition for leave to borrow 30 million dollars. Court will set oral argument on motion, responses and petition shortly after October 19, 1979 and all pleadings are filed—McGarr, J. Mailed notices 9-13-79. P

9-18-79 Enter order dated 9-14-79: Conference held. Order of September 10, 1979 is vacated. Time is shortened in which Trustee and any other party are to respond to motion of Indenture Trustees and Intervenors Crown, et al. for an order directing the Trustee to cease freight operations and to commence liquidation of the Debtors [*sic*] estate to October 5, 1979. Hearing on the motion of Indenture Trustees, etc. is set for October 10, 1979 at 11:00 a.m. Status hearing set for September 17, 1979 is vacated—McGarr, J. Mailed notices 9-17-79. P

• • •

9-25-79 Filed 9-25-79: Motion of the State of Kansas for an order directing Trustee to cease operations commence liquidation of the debtors [*sic*] estate and seek directed service from the Interstate Commerce Commission. P

9-27-79 Enter order dated 9-26-79: Trustee's oral application for authority to continue the operation of the debtors [*sic*] business pursuant to the Courts [*sic*] previous orders and until the further order of the Court, is denied without prejudice—McGarr, J. Mailed notices 9-27-79. P

• • •

10-12-79 Enter order dated 10-10-79: Hearing on motion of Indenture Trustees and Intervenor Crown, et al. for an order directing the trustee to cease freight operations and to commence liquidation held. Request declaring the debtor cashless is moot. Trustees [*sic*] authority to draw from escrow accounts to meet operating or other expenses is revoked. Request declaring that further expense of administration borrowings to support operations is not justified under Section 77(c)(3) of the Bankruptcy Act. etc. is granted and than [*sic*] is vacated. Request requiring the Trustee to cease all freight operations etc. is moot. Trustee is directed to commence immediate negotiations with the Regional Transportation Authority for the sale to it of Rock

Island commuter lines. Trustee is directed to file combined plan of reorganization not later than sixty days from today. Request that the Trustee take actiopns [*sic*] to effectuate the terms of Court's order etc. is moot. Courts [*sic*] witness, Peat, Marwick, Mitchell & Co. is directed to recast its study in consultation with the committee of the FRA, the creditors and the Trustee, etc. in the light of the Courts [*sic*] order. Status hearing set for November 1, 1979 at 2:00 p.m.—McGarr, J. Mailed notices 10-12-79. P

10-12-79 Enter order dated 10-10-79: Petition of Trustee to suspend all service and transportation is taken under advisement—McGarr, J. Mailed notices 10-12-79. P

• • •

10-12-79 Filed 10-11-79: Motion of the State of Texas for an order directing Trustee to case [*sic*] operations commence liquidation of the debtors estate and comply with directed service from the ICC.

• • •

10-12-79 Enter order dated 10-10-79: Order of October 10, 1979 is amended as follows: Hearing on motion of Indenture Trustees and Intervenor Crown, et al. for an order directing the Trustee to cease freight operations and to commence liquidation held. Request for declaration that the debtor is cashless is moot. Trustee's authority to draw from escrow accounts to meet operating or other expenses is revoked. Request requiring the Trustee to cease all freight operations, etc. is moot. Trustee is directed to commence immediate negotiations with the Regional Transportation Authority for the sale of it of Rock Island Commuter lines. Trustee is directed to file plan of reorganization not later than sixty days from today. Request that the Trustee take actions to effectuate the terms of courts [*sic*] order etc. is moot. Courts [*sic*] witness Peat, Marwick, Mitchell & Co. is directed to recast its study, in

consultation with the committee of the FRA. The creditors and the Trustee etc. in the light of the court's order. Status hearing set for November 1, 1979 at 2:00 p.m.—McGarr, J. Mailed notices 10-12-79. P

• • •

12-28-79 Filed 12-28-79 Notice re Plan

12-28-79 Filed 12-28-79 PLAN OF REORGANIZATION FOR CHICAGO ROCK ISLAND R. R. CO.

12-28-79 Filed 12-28-79 Appendix B to Plan of Reorganization (Volume I).

12-28-79 Filed 12-28-79 Appendix B to Plan of Reorganization (Volume II). P

1-3-80 Enter order dated 1-2-80: Status hearing held. Draft order to be submitted on courts forwarding Trustees [*sic*] plan of reorganization to the Interstate Commerce Commission. Pre-trial conference set for January 23, 1980 at 4:00 p.m.—McGarr, J. Mailed notices 1-3-80. P

1-3-80 Filed 1-2-80: Notice and State of Kansas motion to obtain a copy of Peat, Marwick, Mitchell & Company study.

1-3-80 Enter order dated 1-2-80: State of Kansas' motion to obtain a copy of the Peat, Marwick, Mitchell & Company's study is denied without prejudice—McGarr, J. Mailed notices 1-3-80. P

• • •

1-9-80 Enter order dated 1-8-80: Enter *Order No. 221* requiring proposed alternative plans or comments on Plan of Reorganization to be filed before January 28, 1980 as per draft—McGarr, J. Mailed notices 1-9-80. P

1-24-80 Filed 1-23-80 Peat, Marwick, Mitchell & Co. Phase II Report presenting our independent assessment of the Trustees [*sic*] Core System Plan. (large volume) P

• • •

1-28-80 Enter order dated 1-25-80: Intervenors Crown, et al's motion for an extension of time within which to file comments plan of reorganization, or modifications to the Trustees [*sic*] plan of reorganization is moot—McGarr, J. Mailed notices 1-28-30. P

1-28-80 Enter order dated 1-25-80: Trustees Petition for authority to issue Trustee's certificates pursuant to Section 77(c) of the Bankruptcy Act is moot—McGarr, J. Mailed notices 1-28-80. P

1-28-80 Enter order dated 1-25-80: Status hearing held. Arguments are heard. Motion of creditors that the Court decline to forward proposed Plan of Reorganization to Interstate Commerce Commission is granted. The proposed plan filed with the Court is deemed without merit and the Court declines to forward such plan to the commission [*sic*] as provided in Bankruptcy Rule 8-303. Trustee directed to commence preparation of preliminary plan for liquidation and creditors given leave to forward comments and suggestions as to such plan to Trustee with copies to the Court. Status hearing continued to February 19, 1980 at 2:00 p.m.--McGarr, J. Mailed notices 1-28-80. P

• • •

2-20-80 Filed 2-19-80 Railway Labor Executives' Associations' notice; comments on any plan proposed under order of this court docketed January 28, 1980. jm

• • •

2-20-80 Enter order dated February 19, 1980: Status hearing held. Comments of Railway Labor Executives' Association on any plan proposed under order of this Court docketed January 28, 1980 which was filed this day, will be considered as a motion to reconsider vacating the order of January 28, 1980. Said motion is taken under advisement. Status hearing continued to February 28, 1980 at 2:00 p.m.—McGarr, J. Notices mailed 2-20-80. jm

• • •

2-28-80 Enter order dated February 27, 1980: Motion of Railway Labor Executives' Association to reconsider the order of January 28, 1980 is denied.

• • •

3-14-80 Filed 3-13-80 RLEA's NOTICE OF APPEAL (orders 1-28-80 and 2-27-80). $70.00. jm

• • •

4-15-80 Enter order dated April 14, 1980: Motion to confirm the discontinuance of railroad operation is continued to June 2, 1980 at 2:00 p.m. Trustee to file with the Interstate Commerce Commission in 10 days an application of the type described in motion, with the Interstate Commerce Commission to file its response 30 days thereafter. Hearing on Interstate Commerce Commission's response set for June 2, 1980 at 2:00 p.m. McGarr, J. Notices mailed 4-15-80. jm

• • •

5-30-80 Filed 5-29-80 Nebraska Department of Economic Development's motion regarding total system abandonment of the Chicago, Rock Island & Pacific Railroad. jm

6-3-80 Filed 5-30-80 Oklahoma Department of Transportation's notice of filing; comments to be filed with Court on RI abandonment. jm

6-3-80 Filed 5-30-80 comments of Railway Labor Executives' Association in opposition to trustee's request to abandon his entire system. jm

6-3-80 Filed 5-30-80 Illinois Commerce Commission's notice of filing; memorandum of the People of the State of Illinois and the Illinois Commerce Commission. jm

6-3-80 Filed 5-30-80 Report of Trustee as to compliance with order No. 232; Exhibits. jm

• • •

6-3-80 Filed 6-2-80 Motion of Panhandle Regional Planning Commission in opposition to the application by

William M. Gibbons, trustee [*sic*] for confirmation of abandonment of certain Rock Island Lines in the Texas panhandle.

6-3-80 Enter order dated June 2, 1980: Motion of Panhandle Regional Planning Commission in opposition to the application by William M. Gibbons, trustee, for confirmation of abandonment of certain Rock Island Lines in the Texas panhandle is denied. McGarr, J. Notices mailed 6-3-80. jm

• • •

6-3-80 Enter order dated June 2, 1980: Hearing on application of trustee to confirm the discontinuance of railroad operations and response of the Interstate Commerce Commission and other parties held. Trustee's petition for abandonment will be granted and is so ordered. Draft order to be presented and to be order No. 248. Oral motion of Railway Labor Executives' Association for stay pending appeal is denied. McGarr, J. Notices mailed 6-3-80. jm

• • •

6-3-80 Enter order dated June 2, 1980: ENTER ORDER No. 248 that the total systems abandonment of Rock Island's lines and the discontinuance of all of its rail services and obligations as a common carrier is confirmed and decreed, etc. (DRAFT) McGarr, J. Notices mailed 6-3-80. jm

• • •

6-5-80 Filed 5-30-80 brief of the trustee and creditors for confirmation of abandonment of Rock Island Railroad Lines (including railroad subsidiaries and discontinuance of service). jm

• • •

6-9-80 Filed 6-5-80 Henry Crown et al's notice of filing.

6-9-80 Filed 6-5-80 Trustee and Creditors' COMPLAINT for declaratory judgment and injunctive relief. jm

6-9-80 Filed 6-5-80 plaintiffs' motion for temporary restraining order and preliminary injunction and supporting affidavit.

6-9-80 Enter order dated June 5, 1980: Plaintiffs' motion for temporary restraining order and preliminary injunction, (Trustee, Continental Bank, First National Bank, Crown, et al) is set for hearing on June 9, 1980 at 10:30 a.m. McGarr, J. Notices mailed 6-9-80. jm

• • •

6-9-80 Filed Railway Labor Executives' Association's #3 NOTICE OF APPEAL. $70.00. st

• • •

6-10-80 Filed 6-9-80 Henry Crown et al's notice of filing.

6-10-80 Filed 6-9-80 brief of the trustee and creditors in support of their motion for a temporary restraining order, preliminary injunction and declaratory judgment. (bound).

6-10-80 Filed 6-9-80 brief of the trustee and creditors in support of their motion for a temporary restraining order, preliminary injunction and declaratory judgment (bound—corrected). jm

6-10-80 Filed 6-9-80 certificate of service.

• • •

6-10-80 Enter order dated June 9, 1980: Hearing on motion for temporary restraining order and preliminary injunction and declaratory judgment, [*sic*] (Trustee, Continental Bank, First National Bank, Crown, et al) held. Court enters its findings of fact and conclusions of law from the bench. Motion for preliminary injunction will be granted. Order will issue. Oral motion for stay is denied.

• • •

6-10-80 Enter order dated June 9, 1980: Enter Preliminary Injunction—(DRAFT) McGarr, J. Notices mailed 6-10-80. jm

• • •

6-12-80 Filed 6-11-80 RLEA's NOTICE OF APPEAL to the
1 SC U.S. Supreme Court from order dated 6-9-80 (injunction). $5.00. jm

• • •

6-23-80 Filed 6-20-80 USA's notice of motion.

6-20-80 Filed 6-20-80 USA's motion to vacate preliminary injunction entered on June 9, 1980.

6-23-80 Filed 6-20-80 memorandum of points and authorities in support of the defendants' motion to vacate preliminary injunction entered June 9, 1980. st

6-23-80 Enter order dated June 20, 1980: Defendants' motion to vacate preliminary injunction entered on June 9, 1980 is heard and denied. McGarr, J. Notices mailed 6-23-80. st

• • •

6-23-80 Filed 6-20-80 memorandum of the Interstate Commerce Commission of points and authorities in support of defendants' motion to vacate preliminary injunction entered June 9, 1980. st

6-23-80 Filed 6-20-80 notice of filing; memorandum of Railway Labor Executives' Association in support of motion to vacate preliminary injunction; appendices. st

• • •

7-10-80 Filed 7-9-80 USA's NOTICE OF APPEAL to the U.S.
2 SC Supreme Court from order dated June 9, 1980. No FEE. st

• • •

10-8-80 Filed 10-7-80 motion of the United States of America for an order vacating the injunction entered by this Court on June 9, 1980 enjoining the trustee, the Interstate Commerce Commission, and the Secretary

of Transportation from complying with sections 106 and 110 of the Rock Island Transition and Employee Assistance Act.

10-8-80 Filed 10-7-80 memorandum of points and authorities of the United States of America in support of its motion to vacate preliminary injunction entered on June 9, 1980; attachments. jm

• • •

10-8-80 Enter order dated October 7, 1980: Motion of the United States of America to vacate preliminary injunction entered June 9, 1980 is taken under advisement. Parties to respond to said petition by 3:00 p.m. Friday, October 10, 1980, with reply to be filed on Tuesday morning, October 14, 1980. McGarr, J. Notices mailed 10-8-80. jm

10-8-80 Filed 10-7-80 memorandum of the Interstate Commerce Commission; attachment. jm

10-8-80 Enter order dated October 7, 1980: Motion of the Interstate Commerce Commission for declaration that the Commission not bound by June 9, 1980 injunction in implementing Section 701 of the Staggers Act or lifting of prior injunction is taken under advisement. Parties to respond to said petition by 3:00 p.m., Friday, October 10, 1980, with reply to be filed on Tuesday morning, October 14, 1980. McGarr, J. Notices mailed 10-8-80. jm

10-8-80 Filed 10-7-80 RLEA's notice of filing; motion by intervenor Railway Labor Executives' Association for an order vacating the preliminary injunction issued 6-9-80, and for an order directing the trustee to negotiate in accordance with Section 106(a) of the Rock Island Transition and Employee Assistance Act; attachments. jm

10-8-80 Enter order dated October 7, 1980: Motion by Intervenor Railway Labor Executives' Association to vacate preliminary injunction and to direct Trustee to negotiate is taken under advisement. Parties to respond to said petition by 3:00 p.m. Friday, October 10, 1980, with reply to be filed on Tuesday morning, October 14, 1980. McGarr, J. Notices mailed 10-8-80. jm

• • •

10-10-80 Filed 10-9-80 mailgram from John O'B. Clarke to Judge McGarr re: RLEA's request to vacate preliminary injunction. jm

• • •

10-14-80 Filed 10-10-80 brief of trustee and creditors in opposition to RLEA's motion to vacate the preliminary injunction and in support of the trustee's request for instructions or clarification and, in the alternative, in support of the motions of the trustee and creditors for a declaratory judgment that the Rock Island Act, as amended, remains unconstitutional. (bound). jm

• • •

10-17-80 Filed 10-14-80 reply of Railway Labor Executives' Association to response of trustee and creditors to motion to vacate preliminary injunction. ij

• • •

10-17-80 Enter order dated October 15, 1980; Enter Preliminary injunction. (DRAFT)—McGarr, J. Notices mailed 10-17-80. ij

10-17-80 Filed 10-16-80: Railway Labor Executive's Association notice of appeal. (Appeal #9).

• • •

10-23-80 Filed 10-14-80 Reply Memorandum of United States of America.

• • •

•

10-23-80 Enter order dated 10-16-80: The preliminary Injunction entered October 15, 1980 is hereby corrected as follows:

(1) p. 1. lines 1 and 2 should read "This matter is before the court on the motion of the intervenor railway [*sic*] Labor Executives Association (RLEA) joined by the United States and the Interstate Commerce Commission, requesting this court . . . .

(2) p. 3, line 13 should read: ". . . Island estate with priority over claims of creditors and . . .

(3) P. 4, line 4 should read: ". . . arguments of counsel, the court orders the continuance of the preliminary . . ."

(4) P. 4, line 16 should read ": 4) the Court orders the continuance of the preliminary injunction: . . ." —McGarr, J.

Mailed notices 10-23-80. P

10-23-80 Filed 10-23-80 Notice of filing and Motion by Railway Labor Executives [*sic*] Association for a stay of preliminary Injunction pending Appeal.

• • •

10-29-80 Filed 10-23-80 Supplemental Memorandum of Railway Labor Executives [*sic*] Association in support of stay of preliminary injunction pending appeal.

• • •

10-29-80 Filed 10-29-80 *Notice of Appeal* by United States of America and The Interstate Commerce Commission and Neil Goldschmidt United States Secretary of Transportation from the Prel. Injn. order entered on October 15, 1980 enjoining enforcement of Sections 106 and 110 of Rock Island Transition Act.

• • •

10-30-80 Filed 10-29-80 Memorandum of Trustee and Creditors in Opposition to RLEA's motion to stay the preliminary Injunction pending appeal.

• • •

11-10-80 Enter order dated November 7, 1980: Railway Labor Executives' Association motion for reconsideration of this Court's denial of a stay of the Preliminary Injunction pending appeal is hereby denied.

• • •

Selected Docket Entries in

7th Cir. No. 80-2487

In re Chicago, Rock Island & Pacific Railroad Co.

Appeal of

Railway Labor Executives' Association

U.S. COURT OF APPEALS
SEVENTH CIRCUIT

Docket General No. 80-2487

• • •

Summary Of Events

Docketed: 10-21-80
Docket Fee Paid: yes
Appendix: 10/29/80, 11/10/80
Appellant's Brief: 10/29/80
Appellant's Brief: 11/12/80 corrected
Appellee's Brief: 11/10/80, dist.
Reply Brief: 11/12/80, dist. en banc
Notice of Oral Arg: 10/23/80
Briefs Distributed: Nov. 1980
Date of Oral Arg: 11/13/80
Panel: en banc
Order Date: 12/16/80
Disposition: AFFIRMED
Mandate Issued: 1/15/81 Bill of Costs: 3/23/81
Record Returned: 1/15/81

• • •

1980

10/25 Filed O&3c Railway Labor Executives' Association's motion to dismiss, in the alternative, to certify the question on this appeal to the United States Supreme Court, svc.

• • •

11/3 Entered order that the motion to dismiss or to certify the question on appeal to the US Supreme Court shall be taken with the case. Counsel for the trustee shall file an additional 21 copies of this motion for dist. to the full court. Further ordered that the motion for

extension of time to respond to motion to dismiss or certify treated as a motion for leave to respond to motion to dismiss is DENIED. The amicus curiae motion suggesting interests that it has in the questions raised by the motion to dismiss, further ordered that the submission of brief by Ogilvie, Trustte [*sic*] of Chi., Mil., St. Paul and Pacific RR Co. in support of appellants and motion to file oversized brief is GRANTED.

11/4 Filed O&3c motion of the trustee and creditors for certain procedural relief., svc. (80-2536)

11/5 Entered order that the court request for extension of time is DENIED. The court further ordered that the request to bar appellant's from filing a reply brief is DENIED. The court also further ordered the request to require appellants to respond is DENIED., [*sic*] The court reaffirms its order 11/3/80 permitting appellant to respond to the motion in its reply brief. Also further ordered that the request for additional time at oral argument is GRANTED to the extent that each side shall have 5 additional min. Also further ordered the request for leave to file an oversized brief is GRANTED to the extent that the turstee [*sic*] may file a brief up to 75 pages. The court also further orders sua sponte, that these 2 appeals are consolidated.

• • •

11/8 Filed O&2c emergency motion by intervenor-appellant Railway Labor Executives' Assoication [*sic*] for a stay of the preliminary injunction pending appeal svc. (80-2536)

• • •

2/20 Filed O&3c emergency motion to stay pending appeal to the Supreme Court., scv. of RP Labor Exec's. [*sic*] (80-2536)

12/19 Filed notice of appeal to Supreme Court of appellant., svc.

12/23 Filed O&3c memo of trustee in opposition to RLEA's motion to stay pending appeal to the Supreme Court., svc.

12/16 Entered order per CR 35 AFFIRMED. (80-2536).

12/16 Entered final judgment order AFFIRMED with costs. (80-2536).

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12/31 Entered order that motion for stay is hereby DENIED but FURTHER ORDERED that if stay of 6/9/80 order is obtained in Supreme Court, this court, on that contingency, hereby grants stay of 10/15/80 order. (80-2536)

• • •

4/30 Entered order from Sup. Ct. noting probable jurisdiction. (80-2536)

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Selected Docket Entries in

7th Cir. No. 80-2536

In re Chicago, Rock Island & Pacific Railroad Co.

Appeals of

United States of America,

the Interstate Commerce Commission,

and Neil Goldschmidt

U.S. COURT OF APPEALS
SEVENTH CIRCUIT

Docket 80-2536

• • •

Summary Of Events

Docketed: 10-30-80
Docket Fee Paid: U.S. Appeal
Appendix: 10/29/80, 11/10/80
Appellant's Brief: 10/29/80
Appellee's Brief: 11/10/80, dist.
Reply Brief: 11/12/80 dist. en banc.
Date of Oral Arg: 11/13/80
Panel: en banc
Order Date: 12/16/80
Disposition: AFFIRMED
Mandate Issued: 1/15/81 Bill of Costs: 3/23/81
Record Returned: 1/15/81

• • •

1/8 Filed appellants' notice of appeal to supreme court. [*sic*]. (80-2487)

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Complaint for Injunctive Relief

filed June 5, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 B 2697

In the Matter of

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, Debtor, WILLIAM M. GIBBONS, as Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; and HENRY CROWN, et al., *Plaintiffs*,

v.

THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, *Defendants*.

In Proceedings for the Reorganization of a Railroad

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

This action is brought by the Trustee and Creditors of the estate of the Chicago, Rock Island and Pacific Railroad Company ("the Rock Island"), which is now in liquidation, to enjoin the enforcement of the Rock Island Railroad Transition and Employee Assistance Act ("the Rock Island Act" or "the Act"). The plaintiffs also seek a declaration that the Rock Island Act is unconstitutional under the Fifth and Fourteenth Amendments to the United States Constitution, on the grounds that it imposes a debt on the Rock Island estate which constitutes an uncompensated taking of private property for public purposes, and by that and other provisions violates the plaintiffs' due process and equal protection rights, the constitutional separation of

powers principle, and the principle that laws respecting bankruptcy must be uniform. In support thereof, the plaintiffs, by their attorneys, state as follows:

Jurisdiction and Venue

1. This Court has jurisdiction under Section 77 of the Bankruptcy Act. Jurisdiction also arises under 28 U.S.C. § 1331(a), in that the matter in controversy arises under the Constitution and laws of the United States. This Court also has jurisdiction of this action under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, because the plaintiffs seek a declaration of their rights and further relief concerning an actual controversy otherwise within this Court's jurisdiction.

2. Venue is proper in this District under 28 U.S.C. § 1391(e), in that the causes of action alleged involve the United States and its officers and agents acting in their official capacities. The United States of America and the Interstate Commerce Commission both maintain offices in this District in Chicago, Illinois. The Rock Island maintains its principal place of business in this District, and the Rock Island estate owns real property in this District which would be affected by the actions sought to be enjoined.

3. This action is brought as part of the proceedings for the reorganization of a railroad, *In re Chicago, Rock Island and Pacific Railroad Company*, No. 75 B 2697 ("the reorganization proceedings"), because it relates to property included in these proceedings.

The Parties

4. Plaintiff William M. Gibbons is Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor ("the Trustee"). The Rock Island is a railroad which the defendant Interstate Commerce Commission has found to

be cashless, and therefore without further common carrier responsibilities. Pursuant to the order of the Reorganization Court of January 25, 1980, the Rock Island is now in the process of liquidation under the supervision of the Trustee. The Trustee is responsible for the preservation and disposition of the assets of the Rock Island estate pursuant to Section 77 of the Bankruptcy Act and the orders of the Reorganization Court. Under the Rock Island Act, he is charged with the responsibility for negotiation of an agreement implementing its provisions concerning labor protection. Under Section 106 of the Act, he is subject to an order of the bankruptcy court, which must direct implementation of an employee protection arrangement imposed by the defendant Interstate Commerce Commission. Section 110(b) of the Rock Island Act provides that obligations guaranteed by the United States government to implement any employee protection arrangement under it "shall be treated as an administrative expense of the estate of the Rock Island Railroad." The Rock Island Act therefore purports to impose on him new obligations which directly conflict with his existing duties to preserve the assets of the estate and the interests of all of its creditors and shareholders and would impair his ability to carry out these duties.

5. The plaintiffs, Henry Crown, et al., hold substantial blocks of Rock Island common stock, first mortgage bonds, and income debentures. The Crown plaintiffs have been found by the Reorganization Court to have a "substantial interest in the Rock Island." They were permitted to intervene in these proceedings, and have actively participated in all other proceedings relating to the Rock Island estate. The interest of the Crown plaintiffs would be substantially impaired by the imposition of $75,000,000 in priority debt for labor protection costs as contemplated by the Act.

6. Plaintiff First National Bank of Chicago ("the First National Bank") appears as Trustee under the First Mortgage Indenture. The imposition of the $75,000,000 adminis-

trative expense debt contemplated by the Act may substantially impair the interests of holders of first mortgage bonds, whom it represents as Trustee.

7. Continental Illinois National Bank and Trust Company of Chicago ("Continental Bank") appears as Trustee under the Income Debenture Indenture. The imposition of the $75,000,000 priority debt contemplated by the Act would substantially impair the interests of holders of income debentures, whom it represents as Trustee.

8. The defendant Interstate Commerce Commission is the federal agency responsible under the Rock Island Act for imposing a labor protection arrangement upon the estate of the Rock Island in the event that the unions representing former employees of the Rock Island and the Trustee cannot agree on a labor protection arrangement.

9. The defendant United States of America, acting through the Secretary of Transportation, shall guarantee obligations of the Rock Island incurred through the imposition of labor protection charges under the Act. Obligations guaranteed by the United States under the Act would be treated as an administrative expense of the Rock Island estate.

FACTUAL ALLEGATIONS

History of Prior Proceedings

10. The Rock Island filed a petition for reorganization pursuant to Section 77 of the Bankruptcy Act in the District Court for the Northern District of Illinois on March 17, 1975. Despite the protestations of the railroad's creditors, the Reorganization Court found that a successful reorganization was "not clearly impossible," and authorized the Trustee to pursue an income-based reorganization.

11. From March 1975 through January 1980 the Reorganization Court and the Trustee sought to serve the public interest through reorganization rather than liquidation. During the four and one-half year period from January

1975 through June 1979, the Rock Island suffered losses in excess of $157 million, thereby reducing the value of the creditors' security in at least that amount.

12. During the attempted reorganization period, the jobs of Rock Island employees were preserved, at a cost to the Rock Island of almost one billion dollars in wages and benefits and at a cost to the plaintiff creditors and shareholders in excess of $150 million in operating losses.

13. Despite the critical cash position of the Trustee, on August 28, 1979, its employees struck the Rock Island. On September 20, 1979, the President of the United States appointed an Emergency Board pursuant to Section 10 of the Railway Labor Act, thereby mandating a return to work by the Rock Island employees. The employees defied the law and refused to return to work.

14. As a result of this strike, the cash reserves of the Trustee were further depleted. On September 26, 1979, the Interstate Commerce Commission found the Rock Island to be cashless, rendering its continuing operations impossible, and ordered directed service by the Kansas City Terminal Railway Company ("the KCT"), and, thereafter, by other companies, to ensure the continued operation of rail service over Rock Island lines.

15. During this period of subsidized directed service, the jobs of all Rock Island employees were preserved through their employment by directed service carriers without regard to the carriers' need for their services. Their employment during this period was directly subsidized by the federal government at a cost to it of over $70 million dollars.

16. After the period for subsidization of directed service under the statute expired on March 23, 1980, the Interstate Commerce Commission authorized non-subsidized "permissive" directed service to continue over Rock Island lines. Such "permissive" directed service operations over some Rock Island lines continues to the present date.

17. Throughout the period during which service over the Rock Island's lines has been maintained under directed service orders, the value of the Rock Island estate has continued to erode. In particular, the estate has not received adequate compensation for the use of its lines and facilities in the public interest.

18. On January 25, 1980, the Reorganization Court found that there was no longer any possibility of an income-based reorganization of the Rock Island, and ordered the Trustee to commence liquidation of the railroad's properties. Cessation of operations by the Rock Island as a railroad with common carrier responsibilities thus became permanent and complete.

19. As of the date of the Rock Island Act, the Rock Island's obligations as a common carrier had already ceased, and the positions of all but a handful of its former employees had already effectively been eliminated.

20. In its Report to the Reorganization Court Concerning the Proposed Total Abandonment of Rock Island Lines, served May 27, 1980, the defendant Interstate Commerce Commission, the agency charged with administration of the national railway transportation system, recommended that the Court authorize the Trustee "to abandon the entire Rock Island system" and to discontinue service over its lines.

21. On June 2, 1980, after notice and hearing, the Reorganization Court ordered the system-wide abandonment of all Rock Island lines and the discontinuance of all its rail services and obligations as a rail carrier, subject to certain recommendations proposed by the defendant Commission. The Court thus confirmed the prior termination of the common carrier obligation of the Rock Island.

The Rock Island Act

22. The Rock Island Railroad Transition and Employee Assistance Act was signed into law on May 30, 1980. A

copy of the Act is attached as Exhibit A to this complaint and incorporated herein.

23. By its terms, the Act becomes effective immediately upon its enactment. It was signed by the President on May 30, 1980.

24. Section 102 of the Act contains a congressional finding that "uninterrupted continuation of services over Rock Island lines is dependent on adequate employee protection provisions", thus stating the purported public purpose of the Act.

25. Section 106 of the Act establishes and creates a new obligation against the estate for "a fair and equitable arrangement with respect to employee protection." This obligation is cumulative with and in addition to employee protection already available to former Rock Island employees under other statutes and agreements.

26. Section 106 requires the railroad and labor organizations representing its employees to enter into a negotiated agreement within 10 days of the enactment of the legislation, which provides "protection for employees who are adversely affected as a result of a reduction in service by such railroad. Such employee protection may include, but need not be limited to, interim employee assistance, moving expenses, employee relocation incentive compensation, and separation allowances."

27. Section 106(b) requires the imposition of a "fair and equitable" labor protection arrangement by the Interstate Commerce Commission after the 10 day voluntary period has expired. It defines "fair and equitable" as "no less protective of the interests of employees than protection afforded under Section 9 of the Milwaukee Railroad Restructuring Act (45 U.S.C. 908) ["MRRA"] . . . ." This arrangement shall be "imposed" within thirty days of the enactment of the legislation.

28. The employee protective provisions of the MRRA, unlike those in the Rock Island Act, were enacted as part

of a statutory plan and in connection with appropriations for the continued operation of core railroad lines.

29. Section 106(e)(2) of the Act provides as follows:

> Benefits and allowances under such agreement or arrangement entered into under this section shall be paid by the Rock Island Railroad from its own assets or in accordance with section 110 of this title, and claims of employees for such benefits and allowances shall be treated as administrative expenses of the estate of the Rock Island Railroad.

Thus, the liabilities created by the Act are administrative expenses of the estate, in preference to certain outstanding claims of creditors and shareholders.

30. Section 110(d) of the Rock Island Act provides that the total liability of the Rock Island under an employee protection arrangement imposed pursuant to Section 106 "shall not exceed $75,000,000."

31. Section 110 of the Rock Island Act establishes a mechanism by which the Secretary of Transportation "shall guarantee obligations of the Rock Island Railroad" incurred "for purposes of providing employee protection" under Section 106, in a principal amount not to exceed $75,000,000. Under Section 110(b), any obligation guaranteed by the government pursuant to the Act "shall be treated as an administrative expense of the Rock Island Railroad."

32. Section 110(e) of the Act purports to limit the total liability of the United States for obligations incurred by the railroad pursuant to the Act to the guaranteed priority loan under Section 110. Section 110(e) provides as follows:

> Except in connection with obligations guaranteed under this section, the United States shall incur no liability in connection with any employee protection agreement or arrangement entered into under section 106 of this title.

33. In sum, the Rock Island Act creates priority obligations of up to $75,000,000 for new employee protection measures found necessary to meet a public purpose. It imposes upon the estate an involuntary taking or loan in that amount, which is guaranteed by the Secretary of Transportation and which is designated as an administrative expense of the Rock Island estate. That loan would fund an arrangement for payment of labor protection charges imposed by the Act, whether negotiated by the Trustee under Section 106(a) or imposed by the Interstate Commerce Commission under Section 106(b). The Act provides no mechanism for compensation to the Rock Island estate for obligations incurred under the Act, and purports to eliminate other remedies.

34. Other sections of the Act purport to limit the procedural rights of the Trustee and creditors under the Act.

35. Section 106(c) purports to require the bankruptcy court to authorize and direct the Trustee to implement immediately an arrangement imposed under Section 106(b).

36. Section 106(d)(1) purports to prohibit any stay of an order of the Interstate Commerce Commission or the bankruptcy court which imposes an arrangement under Section 106(b), by the Commission, the bankruptcy court or "any other court".

37. Under Sections 106(b) and (c), the employee protective arrangements which impose the priority obligation under the Act will become effective no later than thirty days after its enactment, with no possibility of a stay.

38. Section 106(d)(2) of the Act purports to limit the right of review of orders implementing Section 106(b). That section provides as follows:

> Any order described in paragraph (1) of this subsection may be appealed only to the court of appeals of the United States having jurisdiction to review decisions and orders of the bankruptcy court. Any such

appeal to such court of appeals shall be filed within 5 days after the date of entry of the order of the Commission or the bankruptcy court, as the case may be and such court of appeals shall finally determine such appeal within 60 days after the date such appeal is filed. No determination by the court of appeals under this subsection may be reviewed in any other court.

39. The Act imposes additional restrictions on the Trustee in the disposition and use of Rock Island properties.

40. Section 120(a) of the Rock Island Act provides continued directed carrier service without federal government assistance over Rock Island commuter lines which were in operation on March 1, 1980, for a period of two years after the date of the Act. It provides for compensation for the use of Rock Island lines and facilities on terms determined by the Commission to be reasonable. No provision is made for the consent of the Trustee or the approval of the Reorganization Court.

41. Section 120(b) of the Act prohibits the discontinuance of service over a passenger commuter line during the period of directed service.

42. Section 121 provides for "temporary rail banking," by giving the Secretary of Transportation veto power over the scrapping, downgrading or "other disposal" of any line of the Rock Island during the 180 day period following its enactment. However, it provides that the Secretary shall approve the disposition of such lines unless he finds that there has been a written expression of interest in "purchasing, leasing or rehabilitating the particular rail line or facility for purposes of providing rail service," and that there is a "reasonable expectation that such purchase transaction will be consummated."

43. Section 122 purports to create Commission jurisdiction to authorize "any rail carrier willing to do so volun-

tarily to use the tracks and facilities of the Rock Island Railroad . . ." for an indefinite period, under terms of compensation which the Commission finds to be reasonable.

Additional Factual Allegations

44. Since the inception of the reorganization proceedings described in paragraphs 10 through 17 above, the employees of the Rock Island have received five years of labor protection at a cost to the Rock Island estate of almost one billion dollars in wages and benefits and to its creditors in excess of one hundred and fifty million dollars in losses, and at a cost to the federal government in excess of seventy million dollars in directed service subsidies.

45. Employees necessary to the operation of railroad lines over which directed service has been provided by other rail carriers are adequately protected through continued employment by those carriers, and by preferential consideration for other positions on other lines of the interim operating carriers and purchasing carriers. This protection is contractually assured under the terms of a document known as the "Miami Accords," which was executed on March 4, 1980, by the representatives of labor organizations representing former Rock Island employees and interim and directed service carriers.

46. Employees not protected under the Miami Accords are adequately protected under existing statutory provisions, which include the Railway Unemployment Insurance Act, 45 U.S.C. § 351 *et seq.* and the Railway Retirement Act of 1974, 45 U.S.C. § 231 *et seq.* These statutes provide unemployment compensation and other employment protection benefits at a higher level and for longer duration than are available to ordinary workers under most state unemployment insurance plans.

47. The Rock Island Railroad has contributed to funds available for employee protection under these and other

statutory plans. *See* 45 U.S.C. § 358. At no time were these contributions to existing statutory employment protection accounts withheld or deferred, so long as the Rock Island's common carrier obligations remained in existence. At no time have benefits otherwise payable under these statutes been withheld or deferred.

48. In addition to existing statutory employment protection, former Rock Island employees may be protected under a variety of union and private contractual labor protection programs.

49. The former employees of the Rock Island are thus protected without the additional protection made available to them under the Rock Island Act.

50. In its Report to the Reorganization Court Concerning the Proposed Total Abandonment of Rock Island Lines, served May 27, 1980, the defendant Interstate Commerce Commission recommended complete abandonment of Rock Island lines. However, it did not recommend the imposition of any labor protection conditions in connection with its approval of total line abandonment. Rather, the Commission specifically declined to recommend the imposition of employee protective conditions equal to or greater than those provided in *New York Dock Railway Control—Brooklyn Eastern District*, 360 I.C.C. 60 (1970). The Commission pointed out its past practice of refusal to order the imposition of employee protective conditions in entire rail system abandonments.

51. On June 2, 1980, the Reorganization Court ordered the system-wide abandonment of all Rock Island lines. However, the Court found that the imposition of labor protective conditions in connection with the system-wide abandonment was unwarranted under existing law, on the basis of case precedent, and the constitutional and equitable rights of the parties, and specifically directed the Trustee not to pay any employee labor protection or to borrow for that purpose.

52. During the period of reorganization, dividend payments and redemption of the creditors' interests in outstanding Rock Island securities have been suspended and deferred.

53. As of the present date, the assets of the Rock Island, with the imposition of labor protection claims contemplated by the Act, would be clearly insufficient to meet its debt and equity obligations.

54. The employee protection provisions of the Rock Island Act and the other limitations on the disposition of the assets of the Rock Island estate imposed by the Act, confer no benefit upon the Rock Island estate or its creditors, and relieve them of no existing obligation.

55. The imposition of further labor protection costs as an administrative expense against the assets of the estate would result in further impairment of the debt and equity rights of the plaintiff creditors and shareholders.

Count I

(Unconstitutional Taking and Due Process)

56. Plaintiffs reallege and incorporate paragraphs 1 through 55 as paragraph 56 of Count I of this complaint.

57. In this Count, the plaintiffs seek a declaratory judgment, as provided in the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, that the Rock Island Act is unconstitutional, because it violates the prohibition contained in the Fifth Amendment to the United States Constitution against uncompensated takings of private property for public use, and deprives the plaintiffs of their property without due process of law.

58. An actual controversy which is justiciable in character exists between the plaintiffs and the defendants, as to whether the defendants Interstate Commerce Commission and the Secretary of Transportation may impose prior obli-

gations for the cost of labor protection up to the amount of $75,000,000 upon the Rock Island estate, as set forth in paragraphs 22 through 33 of this Complaint, consistent with the Fifth Amendment's prohibition against uncompensated takings of private property for public use.

59. The imposition of the obligations and debt provided under the Act would impair the plaintiffs' rights and security in the assets of the Rock Island estate, and impose upon the Trustee duties which conflict with his existing responsibility to preserve the assets of the estate.

60. A declaratory judgment as to the constitutionality of the Act's provisions would resolve the controversy between the parties as to the authority of the Commission and the Secretary to impose new costs of labor protection as provided in the Act.

Count II

(Unconstitutional Taking, Due Process and Equal Protection)

61. The plaintiffs reallege and incorporate paragraphs 1 through 55 as paragraph 61 of Count II.

62. This Count alleges an unconstitutional taking of the property of the Rock Island estate and violation of the plaintiffs' due process and equal protection rights in section 110(e) of the Act, which is described and set forth in paragraph 28. That section purports to specifically limit the liability of the United States to the loan guarantees provided for in section 110. It thereby purports to eliminate the remedy otherwise available for claims against the United States under the Tucker Act, 28 U.S.C. § 1491 *et seq.* The elimination of this right would destroy the plaintiffs' ability to seek compensation for the taking of their property for public use, as set forth in Count I above, and thereby further violate their equal protection and due process rights.

63. By imposing a borrowing obligation of $75 million and related administrative expense upon the assets of the Rock Island estate without conferring any benefit upon the estate or providing any mechanism for compensation to the estate, the Act violates the constitutionally protected property rights of creditors and constitutes a further unconstitutional taking.

64. The plaintiffs seek a further declaration as provided in 28 U.S.C. § 2201, that Section 110(e) of the Rock Island Act, read in light of its other provisions, is unconstitutional under the Fifth and Fourteenth Amendments to the United States Constitution.

Count III

(Unconstitutional Taking)

65. Plaintiffs reallege and incorporate paragraphs 1 through 55 as paragraph 65 of Count III of this complaint.

66. In this Count, the plaintiffs seek a further declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202, as to the constitutionality of the provisions of the Act which purport to limit their remedies and rights of review under the Act.

67. In this Count, the Plaintiffs seek a further declaratory judgment under 28 U.S.C. §§ 2201 and 2202. Specifically, and in light of the findings of cashlessness, impossibility of reorganization and entitlement to abandonment by the Reorganization Court and the Commission, as set forth in paragraphs 14, and 18 through 21, *supra*, the plaintiffs urge that the Act's provisions which permit continued operation over the Rock Island's lines by other carriers, without the consent or approval of the Trustee and without regard to the rights of creditors, and which otherwise limit the Trustee's right to dispose of the railroad's property, constitute an unconstitutional uncompensated taking of the railroad's property for public purposes, and a deprivation

of the property of the Rock Island estate without due process of law.

Count IV

(Due Process and Equal Protection)

68. Plaintiffs reallege and incorporate paragraphs 1 through 55 as paragraph 68 of Count IV of this complaint.

69. Specifically, the plaintiffs maintain that the provisions described in paragraphs 26 through 37 which require the automatic implementation of an employee protection plan imposed by the Interstate Commerce Commission under section 106(b) of the Act within thirty days, combined with the prohibition of a stay of the Commission's order by the Commission, the bankruptcy court, or any other court, makes a violation of the plaintiff's procedural due process and equal protection rights unavoidable because of the unreasonably short time period established for final, unstayable action affecting the property of the estate.

70. The plaintiffs further maintain that the provision described in paragraph 38, *supra*, which purports to eliminate judicial review of orders of the Commission or bankruptcy court under section 106(b) except for appeals taken within five days to the court of appeals having jurisdiction to review orders of the bankruptcy court, violates their right to due process and equal protection of the laws, under the Fifth and Fourteenth Amendments, in that it deprives them of judicial review of constitutional issues which is available to other citizens. No adequate justification exists for this arbitrary discrimination.

Count V

(Separation of Powers and Equal Protection)

71. The plaintiffs reallege and incorporate paragraphs 1 through 55, *supra*, as paragraph 71 of Count V of their complaint.

72. The provision described in paragraph 38, *supra*, infringes the concept of separation of powers upon which the Constitution is based, in that it purports to deprive the Supreme Court of power to decide the constitutionality of Congressional action.

73. The provision described in paragraph 38, *supra*, which purports to deprive the Supreme Court of jurisdiction to review the constitutionality of the Act, further deprives the plaintiffs of due process and equal protection of the laws, because it would deprive them of judicial review which is available to others. *See* 28 U.S.C. § 2284.

74. The provision described in paragraph 35, *supra*, which purports to require this Court to enforce an order of the Interstate Commerce Commission, no matter how unreasonable or constitutionally deficient, and to deprive this Court of the power to review or reconsider that order, violates the constitutional principle of separation of powers, in that it purports to deprive this Court or any court of inherently judicial powers, by transferring the jurisdiction to determine whether a debt should be imposed upon a debtor's estate to an administrative agency, and by infringing upon the Reorganization Court's judicial discretion and full jurisdiction over a pending proceeding. This defect is aggravated by the prohibition of judicial stay of any Commission order which is contained in the Act, as described in paragraph 37, *supra*.

75. The plaintiffs seek a further declaratory judgment, under 28 U.S.C. §§ 2201 and 2202 that the provisions described in this Count violate the constitutional principles of separation of powers and equal protection as herein stated.

Count VI

(Enactment of a Bankruptcy Law That is Not Uniform)

76. The plaintiffs reallege and incorporate paragraphs 1 through 55 as paragraph 76 of Count VI of this Complaint.

77. Article I, section 8 of the Constitution provides that Congress shall have the power "[t]o establish . . . uniform Laws on the subject of Bankruptcy throughout the United States."

78. Sections 106 and 110 of the Rock Island Act, as described in paragraphs 25 through 38, *supra*, violate the requirement of Article I, section 8, that laws concerning bankruptcy must be uniform, and the plaintiffs' right to equal protection of the laws, by imposing labor protection obligations and debts as an administrative expense upon the estate of the Rock Island, which are higher than and different from those imposed on other bankrupt estates.

79. The plaintiffs seek a further declaration by this Court, under 28 U.S.C. §§ 2201 and 2202, that the provisions of the Rock Island Act described in this Count violate the requirement of Article I, section 8 of the Constitution, that laws in bankruptcy must be uniform.

Count VII

(Injunctive Relief)

80. The plaintiffs reallege and incorporate paragraphs 1 through 79 as paragraph 80 of Count VII.

81. This Count seeks temporary and permanent injunctive relief which is necessary to enforce declaratory judgments as to the issues set forth in Counts I through III, as provided under 28 U.S.C. § 2202. Specifically, the plaintiffs request the Court to enjoin the defendant Interstate Commerce Commission from imposing labor protection obligations, and the defendant Secretary of Transportation from imposing or guaranteeing any loans, pursuant to the Rock Island Act, until final determination of the Act's constitutionality.

82. Injunctive relief is necessary to prevent immediate and irreparable harm to the plaintiff's property and con-

stitutional rights. Specifically, under section 106 of the Act, as set forth in paragraphs 33 through 38, *supra*, if the labor organization representatives and the Trustee are unable to agree on labor protection terms within ten days of the Act's enactment, the I.C.C. "shall impose" labor protection obligations of up to $75,000,000 on the estate as an administrative expense, within thirty days of its enactment. Section 110 of the Act further provides that payment of obligations imposed by the Commission under the Act would be funded by a priority loan guaranteed by the Secretary of Transportation.

83. If the defendants Commission and Secretary are not enjoined from imposing labor protection orders, charges and administrative expenses upon the estate pursuant to the Act, labor protection obligations and charges will be imposed upon the Rock Island estate within thirty days of the enactment of the Act. As described in paragraph 36 of this Complaint, an order of the defendant Commission imposing such obligations, or an order of the bankruptcy court implementing such an order, may not be stayed in any court.

84. Implementation of such an order would cause plaintiffs injury, in that it would be a taking of the property of the Rock Island estate without just compensation, in violation of their Fifth Amendment rights.

85. The imposition of such an obligation or order would cause the plaintiffs further irreparable injury in that the monies paid under it would be paid to individual employees and would be recoverable only by a multiplicity of lawsuits, if at all.

86. The harm imposed by the Act would further be irreparable because the Act purports to limit the liability of the United States to the administrative expense loan imposed by the statute, as described in paragraph 32, *supra*. An order of the Commission imposing labor protection obligations would thus become effective immediately upon

its issuance, which could occur as of June 9, 1980, and under the terms of the Act no stay of such an order could then be issued by any Court. The harm suffered by the plaintiffs due to a Commission order would thus be irreparable upon issuance of the order, because the plaintiffs' right to review prior to its implementation is severely limited under the statute.

Prayer for Relief

Wherefore, the plaintiffs, William Gibbons, First National Bank, Continental Bank, and Henry Crown, et al., respectfully pray that this Court grant them relief as follows:

A. Declare the Rock Island Transition and Employee Assistance Act to be unlawful and unconstitutional on the ground that it violates the Fifth Amendment of the United States Constitution because it mandates an unconstitutional taking of the property of the Rock Island estate for public purposes without just compensation.

B. Declare the Rock Island Employee Assistance Act unconstitutional insofar as it violates the due process clause of the Fifth Amendment and the equal protection provisions of the Fifth and Fourteenth Amendments, and the Constitutional doctrine of separation of powers.

C. Issue a preliminary and permanent injunction, enjoining the defendant I.C.C. from entering an order under the authority granted to it by the Act, imposing labor protection on the estate of the Rock Island, and

enjoining the defendant and Secretary of Transportation from imposing a loan to fund any labor protection provision under the Act.

D. Award plaintiffs their costs and attorneys fees.

E. Grant such further relief as the Court deems just and appropriate.

Respectfully submitted,

Of counsel:

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June 5, 1980.

(Certificate of service omitted in printing.)

Appendix B

to June 20, 1980 Memorandum of RLEA

(Statistical Information)

UNITED STATES OF AMERICA
RAILROAD RETIREMENT BOARD
844 Rush Street
Chicago, Illinois 60611

June 18, 1980

Mr. John O'B. Clark, Jr.
Highsaw, Mahoney & Friedman
Suite 210
1050 Seventeenth Street, N.W.
Washington, D.C. 20036

Dear Mr. Clark:

Enclosed herewith is the information in the possession of the Board that you requested as to the statistical breakdown of years of service of Chicago, Rock Island and Pacific Railroad employees.

The information contained in the accompanying document numbering 22 pages was derived from information reported to the Railroad Retirement Board by the Chicago, Rock Island and Pacific Railroad for the year 1978. The information was compiled and maintained in the normal and routine course of the Board's official duty.

As Secretary of the Board, the undersigned has custody of enclosed material and has affixed the seal of the Board thereto in certification that it is a true and accurate copy of records in the Board's possession.

Very truly yours,

/s/ R. F. BUTLER
FOR THE BOARD
R. F. Butler, Secretary

Enclosures

1978 WAGE STUDY

AGE GRP.	YRS. SER.	NUMBER	AGGREGATE CURR YEAR SERV MONS	AGGREGATE CURR YEAR RRA COMP	AGGREGATE CURR YEAR RUIA COMP	CONTINUING SERVICE EMPLOYEES
< 20	< 1	138	435	408374	163478	27
	1	18	181	212919	71093	18
Total		156	616	621293	234571	45

Certified to be a true and accurate copy.

TABLE R-15

PAGE 1

RE-ENTS	- NEW ENTRANTS - NUMBER	QUAL RUIA	MEN	WOMEN	EMPLOYEES WITH 354 SERV MONS	NUMBER WITH MAX RRA	ELIGI-BILITY
0	111	20	135	3	0	3	39
0	0	0	17	1	0	0	18
0	111	20	152	4	0	3	57

/s/ R. F. BUTLER
R. F. Butler
Secretary of the Board

AGE GRP.	YRS. SER.	NUMBER	AGGREGATE CURR YEAR SERV MONS	AGGREGATE CURR YEAR RRA COMP	AGGREGATE CURR YEAR RUIA COMP	CONTINUING SERVICE EMPLOYEES
20-24	< 1	573	1,981	1828913	727253	87
	1	245	1,977	2212455	768424	234
	2	105	984	1183374	386026	100
	3	68	658	787972	255611	67
	4	72	822	1031111	325028	72
	5	50	564	706312	221153	50
	6	15	173	225728	69600	15
Total		1128	7,159	7975865	2753095	625

TABLE R-15

PAGE 2

RE-ENTS	- NEW ENTRANTS - NUMBER	QUAL RUIA	MEN	WOMEN	EMPLOYEES WITH 354 SERV MONS	NUMBER WITH MAX RRA	ELIGI-BILITY
24	462	127	553	20	0	8	175
10	1	1	236	9	0	2	228
5	0	0	102	3	0	2	98
1	0	0	65	3	0	3	61
0	0	0	69	3	0	1	71
0	0	0	47	3	0	3	48
0	0	0	15	0	0	2	15
40	463	128	1087	41	0	21	696

1978 WAGE STUDY

AGE GRP.	YRS. SER.	NUMBER	AGGREGATE CURR YEAR SERV MONS	AGGREGATE CURR YEAR RRA COMP	AGGREGATE CURR YEAR RUIA COMP	CONTINUING SERVICE EMPLOYEES
25-29	< 1	383	1,452	1436985	544392	33
	1	146	1,220	1386850	475011	128
	2	91	814	983195	318089	80
	3	68	619	764093	241790	67
	4	102	1,032	1275583	404439	101
	5	146	1,542	2006750	608690	139
	6	118	1,351	1751970	536766	118
	7	129	1,440	1859112	567669	128
	8	122	1,364	1802504	543689	122
	9	95	1,087	1441115	431672	95
	10-14	71	839	1151695	334802	71
Total		1471	12,760	15859852	5007009	1,082

TABLE R-15

PAGE 3

RE-ENTS	- NEW ENTRANTS - NUMBER	QUAL RUIA	MEN	WOMEN	EMPLOYEES WITH 354 SERV MONS	NUMBER WITH MAX RRA	ELIGI-BILITY
45	305	106	355	28	0	7	147
17	1	1	140	6	0	4	128
11	0	0	85	6	0	5	83
1	0	0	67	1	0	0	60
1	0	0	92	10	0	5	97
7	0	0	142	4	0	17	136
0	0	0	115	3	0	15	117
1	0	0	120	9	0	14	125
0	0	0	108	14	0	14	119
0	0	0	87	8	0	11	94
0	0	0	63	8	0	13	71
83	306	107	1374	97	0	105	1,177

1978 WAGE STUDY

AGE GRP.	YRS. SER.	NUMBER	AGGREGATE CURR YEAR SERV MONS	AGGREGATE CURR YEAR RRA COMP	AGGREGATE CURR YEAR RUIA COMP	CONTINUING SERVICE EMPLOYEES
30-34	< 1	192	692	689007	257517	9
	1	52	422	466656	162821	45
	2	32	266	311120	104251	28
	3	39	347	419198	135612	33
	4	50	493	596878	191514	46
	5	56	610	771600	240703	55
	6	68	721	938908	286175	65
	7	89	965	1230689	381304	88
	8	128	1,411	1848516	559345	128
	9	145	1,680	2219829	668009	144
	10-14	496	5,702	7780434	2267985	496
	15-19	40	456	623072	181539	40
Total		1387	13,765	17895907	5436775	1,177

TABLE R-15

PAGE 4

RE-ENTS	- NEW ENTRANTS - NUMBER	QUAL RUIA	MEN	WOMEN	EMPLOYEES WITH 354 SERV MONS	NUMBER WITH MAX RRA	ELIGI-BILITY
33	150	50	182	10	0	2	67
7	0	0	46	6	0	3	43
4	0	0	27	5	0	1	29
6	0	0	36	3	0	4	35
4	0	0	45	5	0	2	44
1	0	0	50	6	0	4	55
3	0	0	63	5	0	10	64
1	0	0	79	10	0	8	86
0	0	0	119	9	0	17	123
1	0	0	131	14	0	21	142
0	0	0	461	35	0	94	489
0	0	0	35	5	0	7	39
60	150	50	1274	113	0	173	1,216

1978 WAGE STUDY

AGE GRP.	YRS. SER.	NUMBER	AGGREGATE CURR YEAR SERV MONS	AGGREGATE CURR YEAR RRA COMP	AGGREGATE CURR YEAR RUIA COMP	CONTINUING SERVICE EMPLOYEES
35-39	< 1	75	278	275920	103458	6
	1	33	275	323757	107284	29
	2	23	193	237383	75801	21
	3	13	113	133230	43393	11
	4	24	237	298324	94510	23
	5	28	267	344996	104760	24
	6	27	269	345589	106620	23
	7	43	428	550073	169986	42
	8	50	548	692462	216589	48
	9	63	715	932617	284074	63
	10-14	369	4,205	5702276	1670652	364
	15-19	374	4,390	6152180	1750919	372
	20-24	46	547	775478	218406	46
Total		1168	12,465	16764285	4946452	1,072

TABLE R-15

PAGE 5

RE-ENTS	- NEW ENTRANTS - NUMBER	QUAL RUIA	MEN	WOMEN	EMPLOYEES WITH 3&4 SERV MONS	NUMBER WITH MAX RRA	ELIGI-BILITY
5	64	22	65	10	0	2	29
4	0	0	30	3	0	1	28
2	0	0	22	1	0	2	21
2	0	0	12	1	0	0	11
1	0	0	21	3	0	0	23
4	0	0	26	2	0	7	24
4	0	0	27	0	0	2	26
1	0	0	37	6	0	1	39
2	0	0	41	9	0	5	50
0	0	0	56	7	0	6	61
5	0	0	348	21	0	68	361
2	0	0	367	7	0	122	370
0	0	0	46	0	0	22	46
32	64	22	1098	70	0	238	1,089

1978 WAGE STUDY

AGE GRP.	YRS. SER.	NUMBER	AGGREGATE CURR YEAR SERV MONS	AGGREGATE CURR YEAR RRA COMP	AGGREGATE CURR YEAR RUIA COMP	CONTINUING SERVICE EMPLOYEES
40-44	< 1	41	130	131632	48049	6
	1	14	123	143797	48666	11
	2	16	135	148446	51066	14
	3	17	161	199404	63438	17
	4	9	91	108500	34804	9
	5	17	155	185936	60703	14
	6	17	166	207101	64399	17
	7	18	180	230831	70518	18
	8	22	229	292216	90003	22
	9	29	316	406862	125423	28
	10-14	141	1,556	2064704	617909	140
	15-19	314	3,589	4942761	1428415	313
	20-24	450	5,279	7409681	2103547	447
	25-29	65	780	1102396	311616	65
Total		1170	12,890	17574267	5118556	1,121

TABLE R-15

PAGE 6

RE-ENTS	- NEW ENTRANTS - NUMBER	QUAL BUIA	MEN	WOMEN	EMPLOYEES WITH 864 SERV MONS	NUMBER WITH MAX RRA	ELIGI-BILITY
5	30	6	37	4	0	0	10
2	1	1	13	1	0	0	13
2	0	0	12	4	0	0	13
0	0	0	13	4	0	1	15
0	0	0	7	2	0	2	9
3	0	0	16	1	0	1	16
0	0	0	14	3	0	2	15
0	0	0	17	1	0	2	16
0	0	0	21	1	0	4	22
1	0	0	25	4	0	2	29
1	0	0	128	13	0	22	138
1	0	0	305	9	0	90	307
3	0	0	432	18	0	144	449
0	0	0	59	6	0	26	65
18	31	7	1099	71	0	296	1,117

1978 WAGE STUDY

AGE GRP.	YRS. SER.	NUMBER	AGGREGATE CURR YEAR SERV MONS	AGGREGATE CURR YEAR RRA COMP	AGGREGATE CURR YEAR RUIA COMP	CONTINUING SERVICE EMPLOYEES
45-49	< 1	16	66	64977	24758	2
	1	6	39	47582	15233	5
	2	8	71	81186	26991	8
	3	10	81	91026	31215	9
	4	10	93	107800	35948	9
	5	7	62	72574	24595	7
	6	14	149	184536	59248	14
	7	13	142	169981	56429	13
	8	18	176	215129	69029	18
	9	19	194	234805	76109	19
	10-14	88	1,006	1312284	400992	87
	15-19	115	1,301	1759689	517361	115
	20-24	367	4,252	5893577	1693243	366
	25-29	352	4,153	5799779	1657414	352
	30+	32	384	538184	153280	32
Total		1075	12,169	16573109	4841845	1,056

TABLE R-15

PAGE 7

RE-ENTS	- NEW ENTRANTS - NUMBER	QUAL RULA	MEN	WOMEN	EMPLOYEES WITH 864 SERV MONS	NUMBER WITH MAX RRA	ELIGI-BILITY
3	11	5	13	3	0	0	9
1	0	0	6	0	0	0	4
0	0	0	8	0	0	1	6
1	0	0	9	1	0	2	9
1	0	0	9	1	0	1	10
0	0	0	6	1	0	0	7
0	0	0	14	0	0	0	14
0	0	0	11	2	0	1	12
0	0	0	17	1	0	2	18
0	0	0	15	4	0	0	18
1	0	0	77	11	0	11	88
0	0	0	104	11	0	19	115
1	0	0	355	12	0	120	362
0	0	0	330	22	13	115	350
0	0	0	26	6	32	16	32
8	11	5	1000	75	45	288	1,054

1978 WAGE STUDY

AGE GRP.	YRS. SER.	NUMBER	AGGREGATE CURR YEAR SERV MONS	AGGREGATE CURR YEAR RRA COMP	AGGREGATE CURR YEAR RUIA COMP	CONTINUING SERVICE EMPLOYEES
50-54	< 1	5	15	15694	5675	0
	1	5	29	32235	11122	4
	2	2	19	24160	7428	2
	3	5	51	65719	20104	5
	4	9	67	70467	26099	7
	5	7	69	71863	26707	7
	6	6	67	82397	26481	6
	7	13	138	152742	53842	13
	8	12	95	100578	37665	12
	9	11	113	135195	44247	11
	10-14	71	790	1008035	314295	71
	15-19	89	961	1250482	382724	86
	20-24	182	2,095	2831926	831970	182
	25-29	453	5,230	7233847	2085095	453
	30+	474	5,495	7687879	2188789	474
Total		1344	15,234	20763219	6062243	1,333

TABLE R-15

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RE-ENTS	- NEW ENTRANTS - NUMBER	QUAL RUIA	MEN	WOMEN	EMPLOYEES WITH 354 SERV MONS	NUMBER WITH MAX RRA	ELIGI-BILITY
3	2	0	5	0	0	1	2
1	0	0	5	0	0	1	4
0	0	0	2	0	0	0	2
0	0	0	5	0	0	1	5
2	0	0	7	2	0	0	6
0	0	0	5	2	0	0	7
0	0	0	4	2	0	0	6
0	0	0	11	2	0	0	13
0	0	0	11	1	0	1	11
0	0	0	9	2	0	1	11
0	0	0	57	14	0	3	69
3	0	0	74	15	0	13	86
0	0	0	170	12	0	37	179
0	0	0	443	10	54	142	446
0	0	0	449	25	474	176	473
9	2	0	1257	87	528	376	1,320

1978 WAGE STUDY

AGE GRP.	YRS. SER.	NUMBER	AGGREGATE CURR YEAR SERV MONS	AGGREGATE CURR YEAR RRA COMP	AGGREGATE CURR YEAR RUIA COMP	CONTINUING SERVICE EMPLOYEES
55	2	1	12	14074	4800	1
	5	1	2	1182	787	0
	6	1	7	6689	2657	1
	7	1	12	13259	4800	1
	8	1	12	13008	4800	1
	9	3	36	46001	14400	3
	10-14	11	126	153531	49272	10
	15-19	5	59	76459	23383	5
	20-24	26	287	381092	114557	26
	25-29	68	757	1022247	301312	68
	30+	111	1,270	1774512	506247	110
Total		229	2,580	3502054	1027015	226

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RE-ENTS	- NEW ENTRANTS - NUMBER	QUAL RUIA	MEN	WOMEN	EMPLOYEES WITH 354 SERV MONS	NUMBER WITH MAX RRA	ELIGI-BILITY
0	0	0	0	1	0	0	1
1	0	0	1	0	0	0	0
0	0	0	1	0	0	0	1
0	0	0	1	0	0	0	1
0	0	0	1	0	0	0	1
0	0	0	2	1	0	0	3
1	0	0	5	6	0	1	11
0	0	0	5	0	0	0	5
0	0	0	24	2	0	5	26
0	0	0	65	3	7	16	65
1	0	0	103	8	111	40	110
3	0	0	208	21	118	62	224

1978 WAGE STUDY

AGE GRP.	YRS. SER.	NUMBER	AGGREGATE CURR YEAR SERV MONS	AGGREGATE CURR YEAR RRA COMP	AGGREGATE CURR YEAR RUIA COMP	CONTINUING SERVICE EMPLOYEES
56	3	1	12	13345	4708	1
	7	1	5	5176	2000	1
	8	1	12	14959	4800	1
	9	1	9	12611	3600	1
	10-14	10	97	120553	38032	10
	15-19	14	168	228212	67200	14
	20-24	19	219	293573	87082	19
	25-29	40	461	625274	183139	40
	30+	124	1,428	1930031	567429	124
Total		211	2,411	3243734	957990	211

TABLE R-15

PAGE 10

RE-ENTS	- NEW ENTRANTS - NUMBER	QUAL RUIA	MEN	WOMEN	EMPLOYEES WITH 364 SERV MONS	NUMBER WITH MAX RRA	ELIGI-BILITY
0	0	0	1	0	0	0	1
0	0	0	1	0	0	0	1
0	0	0	0	1	0	0	1
0	0	0	1	0	0	0	1
0	0	0	8	2	0	0	9
0	0	0	10	4	0	0	14
0	0	0	18	1	0	5	19
0	0	0	36	4	6	7	40
0	0	0	116	8	124	31	123
0	0	0	191	20	130	43	209

1978 WAGE STUDY

AGE GRP.	YRS. SER.	NUMBER	AGGREGATE CURR YEAR SERV MONS	AGGREGATE CURR YEAR RRA COMP	AGGREGATE CURR YEAR RUIA COMP	CONTINUING SERVICE EMPLOYEES
57	2	1	2	746	555	0
	5	1	1	286	286	0
	7	1	12	15056	4800	1
	8	1	7	6783	2764	1
	9	1	12	14848	4800	1
	10-14	9	101	123224	39618	9
	15-19	9	97	118009	38640	9
	20-24	19	213	284708	84995	19
	25-29	56	650	869004	257650	56
	30+	139	1,607	2224897	640508	139
Total		237	2,702	3657561	1074616	235

TABLE R-15

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RE-ENTS	- NEW ENTRANTS - NUMBER	QUAL RUIA	MEN	WOMEN	EMPLOYEES WITH 864 SERV MONS	NUMBER WITH MAX RRA	ELIGI-BILITY
1	0	0	1	0	0	0	0
1	0	0	1	0	0	0	0
0	0	0	0	1	0	0	1
0	0	0	1	0	0	0	1
0	0	0	0	1	0	0	1
0	0	0	6	3	0	1	9
0	0	0	6	3	0	0	8
0	0	0	19	0	0	3	19
0	0	0	52	4	10	12	55
0	0	0	132	7	139	37	138
2	0	0	218	19	149	53	232

1978 WAGE STUDY

AGE GRP.	YRS. SER.	NUMBER	AGGREGATE CURR YEAR SERV MONS	AGGREGATE CURR YEAR RRA COMP	AGGREGATE CURR YEAR RUIA COMP	CONTINUING SERVICE EMPLOYEES
58	4	1	12	14371	4800	1
	7	3	30	36437	11746	3
	8	1	12	16087	4800	1
	9	3	36	47910	14400	3
	10-14	9	96	120484	38363	8
	15-19	4	43	57838	17169	4
	20-24	25	284	370713	113153	25
	25-29	48	567	759652	225770	48
	30+	154	1,763	2441017	701227	153
Total		248	2,843	3864509	1131428	246

TABLE R-15

PAGE 12

RE-ENTS	- NEW ENTRANTS - NUMBER	QUAL RUIA	MEN	WOMEN	EMPLOYEES WITH 864 SERV MONS	NUMBER WITH MAX RRA	ELIGI-BILITY
0	0	0	0	1	0	0	1
0	0	0	3	0	0	0	3
0	0	0	1	0	0	0	1
0	0	0	2	1	0	0	3
1	0	0	8	1	0	0	9
0	0	0	3	1	0	0	4
0	0	0	23	2	0	1	25
0	0	0	44	4	4	8	48
1	0	0	149	5	154	52	153
2	0	0	233	15	158	61	247

1978 WAGE STUDY

AGE GRP.	YRS. SER.	NUMBER	AGGREGATE CURR YEAR SERV MONS	AGGREGATE CURR YEAR RRA COMP	AGGREGATE CURR YEAR RUIA COMP	CONTINUING SERVICE EMPLOYEES
59	< 1	2	8	10053	3150	0
	3	1	8	4995	2454	1
	9	4	45	54929	17337	4
	10-14	6	59	69960	23261	5
	15-19	11	110	129950	43819	11
	20-24	20	232	300228	92474	20
	25-29	59	676	913221	269529	59
	30+	138	1,575	2142416	626176	138
Total		241	2,713	3625752	1078200	238

TABLE R-15

PAGE 13

RE-ENTS	- NEW ENTRANTS - NUMBER	QUAL RUIA	MEN	WOMEN	EMPLOYEES WITH 864 SERV MONS	NUMBER WITH MAX RRA	ELIGI-BILITY
0	2	1	2	0	0	0	1
0	0	0	0	1	0	0	1
0	0	0	4	0	0	0	4
1	0	0	5	1	0	0	6
0	0	0	5	6	0	0	10
0	0	0	17	3	0	2	20
0	0	0	54	5	8	10	58
0	0	0	129	9	138	37	137
1	2	1	216	25	146	49	237

1978 WAGE STUDY

AGE GRP.	YRS. SER.	NUMBER	AGGREGATE CURR YEAR SERV MONS	AGGREGATE CURR YEAR RRA COMP	AGGREGATE CURR YEAR RUIA COMP	CONTINUING SERVICE EMPLOYEES
60	< 1	1	2	1600	800	0
	2	1	9	9439	3417	1
	3	1	12	14917	4800	1
	4	1	2	1469	555	1
	7	1	12	16466	4800	1
	9	1	1	776	400	1
	10-14	3	36	49965	14400	3
	15-19	8	74	95312	28948	8
	20-24	15	146	184195	58306	14
	25-29	29	335	446754	133609	29
	30+	131	1,279	1756628	506921	131
Total		192	1,908	2577521	756956	190

TABLE R-15

PAGE 14

RE-ENTS	- NEW ENTRANTS - NUMBER	QUALRUIA	MEN	WOMEN	EMPLOYEES WITH 864 SERV MONS	NUMBER WITH MAX RRA	ELIGI-BILITY
1	0	0	1	0	0	0	0
0	0	0	1	0	0	0	1
0	0	0	1	0	0	0	1
0	0	0	1	0	0	0	0
0	0	0	1	0	0	0	1
0	0	0	1	0	0	0	0
0	0	0	3	0	0	0	3
0	0	0	6	2	0	0	7
1	0	0	13	2	0	1	14
0	0	0	27	2	6	5	29
0	0	0	123	8	131	38	118
2	0	0	178	14	137	44	174

1978 WAGE STUDY

AGE GRP.	YRS. SER.	NUMBER	AGGREGATE CURR YEAR SERV MONS	AGGREGATE CURR YEAR RRA COMP	AGGREGATE CURR YEAR RUIA COMP	CONTINUING SERVICE EMPLOYEES
61	9	3	31	32683	11109	3
	10-14	3	31	37090	12400	3
	15-19	6	70	86877	27599	6
	20-24	10	120	155448	47910	10
	25-29	24	243	296489	92436	24
	30+	91	853	1163489	337904	91
Total		137	1,348	1772076	529358	137

TABLE R-15

PAGE 15

RE-ENTS	- NEW ENTRANTS - NUMBER	QUAL RUIA	MEN	WOMEN	EMPLOYEES WITH 354 SERV MONS	NUMBER WITH MAX RRA	ELIGI-BILITY
0	0	0	2	1	0	0	3
0	0	0	3	0	0	0	3
0	0	0	4	2	0	0	6
0	0	0	9	1	0	0	10
0	0	0	21	3	4	5	21
0	0	0	90	1	91	25	82
0	0	0	129	8	95	30	125

1978 WAGE STUDY

AGE GRP.	YRS. SER.	NUMBER	AGGREGATE CURR YEAR SERV MONS	AGGREGATE CURR YEAR RRA COMP	AGGREGATE CURR YEAR RUIA COMP	CONTINUING SERVICE EMPLOYEES
62	7	1	10	13470	4000	1
	8	1	10	6086	2577	1
	9	2	13	14411	5054	2
	10-14	2	24	28108	9600	2
	15-19	4	45	52960	17511	4
	20-24	13	131	164439	52106	13
	25-29	28	284	385483	113299	28
	30+	69	634	866165	250698	69
Total		120	1,151	1531122	454845	120

TABLE R-15

PAGE 16

RE-ENTS	- NEW ENTRANTS - NUMBER	QUAL RUIA	MEN	WOMEN	EMPLOYEES WITH 354 SERV MONS	NUMBER WITH MAX RRA	ELIGI-BILITY
0	0	0	1	0	0	0	1
0	0	0	0	1	0	0	1
0	0	0	2	0	0	0	2
0	0	0	2	0	0	0	2
0	0	0	3	1	0	0	4
0	0	0	9	4	0	2	12
0	0	0	27	1	4	6	27
0	0	0	66	3	69	28	59
0	0	0	110	10	73	36	108

1978 WAGE STUDY

AGE GRP.	YRS. SER.	NUMBER	AGGREGATE CURR YEAR SERV MONS	AGGREGATE CURR YEAR RRA COMP	AGGREGATE CURR YEAR RUIA COMP	CONTINUING SERVICE EMPLOYEES
63	7	1	12	16934	4800	1
	8	1	12	15421	4800	1
	9	1	2	111	111	1
	10-14	1	12	13718	4800	1
	15-19	5	47	53326	18800	5
	20-24	12	126	158787	49908	12
	25-29	20	198	268019	78373	20
	30+	52	542	752641	215768	52
Total		93	951	1278957	377360	93

TABLE R-15

PAGE 17

RE-ENTS	- NEW ENTRANTS - NUMBER	QUAL RUIA	MEN	WOMEN	EMPLOYEES WITH 354 SERV MONS	NUMBER WITH MAX RRA	ELIGI-BILITY
0	0	0	1	0	0	0	1
0	0	0	0	1	0	0	1
0	0	0	0	1	0	0	0
0	0	0	1	0	0	0	1
0	0	0	4	1	0	0	4
0	0	0	10	2	0	0	11
0	0	0	20	0	5	4	19
0	0	0	49	3	52	15	51
0	0	0	85	8	57	19	88

1978 WAGE STUDY

AGE GRP.	YRS. SER.	NUMBER	AGGREGATE CURR YEAR SERV MONS	AGGREGATE CURR YEAR RRA COMP	AGGREGATE CURR YEAR RUIA COMP	CONTINUING SERVICE EMPLOYEES
64	10-14	4	43	47320	16948	4
	15-19	1	8	8984	3015	1
	20-24	3	34	39152	13079	3
	25-29	15	133	162643	52504	15
	30+	27	267	360280	104894	26
Total		50	485	618379	190440	49

TABLE R-15

PAGE 18

RE-ENTS	- NEW ENTRANTS - NUMBER	QUAL RUIA	MEN	WOMEN	EMPLOYEES WITH 354 SERV MONS	NUMBER WITH MAX RRA	ELIGI-BILITY
0	0	0	4	0	0	0	4
0	0	0	0	1	0	0	1
0	0	0	3	0	0	1	3
0	0	0	15	0	4	1	15
1	0	0	27	0	27	6	24
1	0	0	49	1	31	8	47

1978 WAGE STUDY

AGE GRP.	YRS. SER.	NUMBER	AGGREGATE CURR YEAR SERV MONS	AGGREGATE CURR YEAR RRA COMP	AGGREGATE CURR YEAR RUIA COMP	CONTINUING SERVICE EMPLOYEES
65-69	10-14	7	71	81593	28096	7
	15-19	4	40	46478	16000	4
	20-24	10	84	109779	33600	10
	25-29	13	117	155544	45801	12
	30+	39	341	456567	132781	38
Total		73	653	849961	256278	71

TABLE R-15

PAGE 19

RE-ENTS	- NEW ENTRANTS - NUMBER	QUAL RUIA	MEN	WOMEN	EMPLOYEES WITH 354 SERV MONS	NUMBER WITH MAX RRA	ELIGI-BILITY
0	0	0	7	0	0	0	6
0	0	0	3	1	0	0	4
0	0	0	6	4	0	0	9
1	0	0	12	1	0	1	12
1	0	0	39	0	39	12	35
2	0	0	67	6	39	13	66

1978 WAGE STUDY

AGE GRP.	YRS. SER.	NUMBER	AGGREGATE CURR YEAR SERV MONS	AGGREGATE CURR YEAR RRA COMP	AGGREGATE CURR YEAR RUIA COMP	CONTINUING SERVICE EMPLOYEES
70+	15-19	4	43	43736	17200	4
	20-24	1	2	2394	800	1
	25-29	3	35	38305	13656	3
	30+	6	61	76508	24058	5
Total		14	141	160943	55714	13

TABLE R-15

PAGE 20

RE-ENTS	- NEW ENTRANTS - NUMBER	QUAL RUIA	MEN	WOMEN	EMPLOYEES WITH 354 SERV MONS	NUMBER WITH MAX RRA	ELIGI-BILITY
0	0	0	3	1	0	0	4
0	0	0	0	1	0	0	0
0	0	0	2	1	1	0	3
1	0	0	5	1	6	0	5
1	0	0	10	4	7	0	12

1978 WAGE STUDY

AGE GRP.	YRS. SER.	NUMBER	AGGREGATE CURR YEAR SERV MONS	AGGREGATE CURR YEAR RRA COMP	AGGREGATE CURR YEAR RUIA COMP	CONTINUING SERVICE EMPLOYEES
Unkwn	4	1	12	11890	4800	1
	5	1	12	16998	4800	1
	30+	3	26	36695	10302	3
Total		5	50	65583	19902	5

TABLE R-15

PAGE 21

RE-ENTS	- NEW ENTRANTS - NUMBER	QUAL RUIA	MEN	WOMEN	EMPLOYEES WITH 354 SERV MONS	NUMBER WITH MAX RRA	ELIGI-BILITY
0	0	0	1	0	0	0	1
0	0	0	1	0	0	0	1
0	0	0	3	0	3	1	2
0	0	0	5	0	3	1	4

1978 WAGE STUDY

AGE GRP.	YRS. SER.	NUMBER	AGGREGATE CURR YEAR SERV MONS	AGGREGATE CURR YEAR RRA COMP	AGGREGATE CURR YEAR RUIA COMP	CONTINUING SERVICE EMPLOYEES
ALL	< 1	1426	5,059	4863155	1878530	170
	1	519	4,266	4826251	1659654	474
	2	280	2,505	2993123	978424	255
	3	223	2,062	2493899	803125	212
	4	279	2,861	3516393	1122497	270
	5	314	3,284	4178497	1293184	297
	6	266	2,903	3742918	1151946	259
	7	314	3,386	4310226	1336694	311
	8	358	3,888	5023749	1540861	356
	9	381	4,290	5594703	1700745	379
	10-14	1301	14,794	19864974	5881425	1,291
	15-19	1007	11,501	15726325	4580242	1,001
	20-24	1218	14,051	19355170	5595136	1,213
	25-29	1273	14,619	20078657	5821203	1,272
	30+	1590	17,525	24207909	6966982	1,585
Grand Total		10749	106,994	140775949	42310648	9,345

TABLE R-15

PAGE 22

RE-ENTS	- NEW ENTRANTS - NUMBER	QUAL RUIA	MEN	WOMEN	EMPLOYEES WITH 354 SERV MONS	NUMBER WITH MAX RRA	ELIGI-BILITY
119	1137	337	1348	78	0	23	479
42	3	3	493	26	0	11	466
25	0	0	260	20	0	11	254
11	0	0	209	14	0	11	199
9	0	0	252	27	0	11	262
17	0	0	295	19	0	32	294
7	0	0	253	13	0	31	258
3	0	0	283	31	0	26	300
2	0	0	320	38	0	43	349
2	0	0	337	44	0	41	372
10	0	0	1186	115	0	213	1,279
6	0	0	937	70	0	251	988
5	0	0	1154	64	0	343	1,204
1	0	0	1207	66	126	358	1,253
5	0	0	1506	84	1,590	514	1,542
264	1140	340	10040	709	1,716	1,919	9,499

Appendix D

to June 20, 1980 Memorandum of RLEA

(Letter from FRA)

DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION
Washington, D.C. 20590

A. E. Egbers
W. R. Denton
R. W. Russell
W. G. Mahoney
F. A. Hardin
R. T. Bates
M. E. Parks

(Clearinghouse Group, March 4
Labor Protection Agreement)

The following information reflects the current status of interim operations over Rock Island lines. Attachment I containing the mileage comparisons was prepared by checking with the Interstate Commerce Commission on interim operator authority, particularly those changes on June 1, and verifications with the carriers. The carload information is an update of 1978 Rock Island traffic obtained from the carrier.

The employment numbers listed below were obtained by telephoning the interim operators. In most cases the point of contact was the labor relations department. The employee counts, refer only to R.I. employees hired under the terms of the March 4 Agreement.

Employees as of 6/13/80:

Missouri Pacific	43
Fort Worth and Denver	18
Illinois Central Gulf	23
Southern Pacific	697
Chicago and Northwestern (CNW)	250
C.N.W. (commuter service for R.T.A. in Chicago)	500

Davenport, Rock Island and Northwestern	58	
Toledo, Peoria and Western	9	
Missouri-Kansas-Texas	366	
Burlington Northern	22	
Milwaukee Road	55	
Total Interim Operators		2,041
Kansas City Terminal (temporary employees)		300
Rock Island Trustee (temporary employees)		300
Total		2,641

/s/ William E. Loftus
William E. Loftus

Attachments

Attachment 1

Rock Island State By State Analysis

ICC INTERIM OPERATOR RECOMMENDATIONS

Effective 6/1/80

	MILEAGE		CARLOADS	
	Existing	*Interim Operations*	*Existing*	*Estimate Retained*
Arkansas	605	200	59,269	40,406
Colorado	258	92	18,539	17,697
Illinois	294	64	132,320	38,143 (1)
Iowa	1,717	848	199,271	178,862
Kansas	1,082	840	86,039	85,094
Louisiana	131	74	4,162	2,448
Minnesota	202	136	23,833	22,801
Missouri	492	472	22,949	17,676
Nebraska	150	43	14,847	7,182
New Mexico	153	129	110	109
Oklahoma	1,055	647	96,773	84,032
Tennessee	1	1	4,903	4,903
Texas	885	773	107,994	104,772 (2)
Total	7,025	4,319 (61%)	771,009	604,125 (78%)

(1) The ICG has expressed an interest in operating on the Joliet to Bureau segment, which would add 53,913 carloads.

(2) No adjustments have been made to Texas carloads because adjustments had previously been made in anticipation of service being provided.

Attachment 2

The following is a list of the segments of the Rock Island over which the ICC has authorized interim operations from June 1, 1980 to Aug. 31, 1980.

Chicago-Joliet, IL.
ICC Decision: RTA. (commuter service only, expires May 29, 1982)

Chicago-Calumet Port District, IL.
ICC Decision: Norfolk & Western (N&W)

Henry to Peoria, IL.
ICC Decision: Burlington Northern (BN)

Peoria Terminal, IL.
ICC Decision: Peoria & Pekin Union, and Toledo, Peoria, and Western (TP&W)

Silvis-Quad Cities-Milan, IL., Wilton, IA.
ICC Decision: Davenport Rock Island and North Western (DRI Line)

West Davenport-Muscatine-Fruitland, IA.
ICC Decision: Milwaukee Road (Milw.)

Keokuk, IA.
ICC Decision: TP&W

Burlington & Fairfield, IA.
ICC Decision: BN

Cedar Rapids, IA.
ICC Decision: C&NW

Waterloo, IA.
ICC Decision: Illinois Central Gulf (ICG)

Washington, IA, and Seymour-Centerville, IA.
ICC Decision: Milw.

Minneapolis and St. Paul-Kansas City Plus Northwest Iowa Grain Lines
ICC Decision: Chicago and North Western (C&NW)

Des Moines and Nearby Stations East and West (Including Newton, Earlham, Pella and Indianola)
ICC Decision: C&NW

Fairbury-Hallam, NE.
ICC Decision: Union Pacific (UP)

Phillipsburg-Almena, KS.
ICC Decision: BN

Colby-Caruso, KS.
ICC Decision: UP

Tucumcari-Topeka-Kansas City-St. Louis (including Dodge City & North Topeka)
ICC Decision: St. Louis Southwestern (SSW)

Herington, KS. to Ft. Worth, TX.
ICC Decision: Missouri-Kansas-Texas (MKT)

El Reno-Oklahoma City-McAlester, OK.
ICC Decision: MKT

North Fort Worth, TX.
ICC Decision: Fort Worth & Denver (FWD)

Fort Worth-Dallas, TX.
ICC Decision: MKT

Irving-Carrollton, TX.
ICC Decision: St. Louis San Francisco (Frisco)

Dallas, Cadiz Street Yard, TX.
ICC Decision: Kansas City Southern (KCS)

Waxachie-North Houston, TX.
ICC Decision: BN

Amarillo, TX., and Amarillo to Bushland, TX.
ICC Decision: FW&D

Memphis, TN. to Brinkley, AR. & Stuttgart, AR.
ICC Decision: SSW

Ruston, LA.
ICC Decision: ICG

Hodge to Winnfield, LA., & Alexandria, LA. Yard
ICC Decision: KCS

Beatrice, NE.
ICC Decision: UP

E Dorado, AR.
ICC Decision: Eldorado & Wesson (E&W)

Newport to South St. Paul, MN.
ICC Decision: Milw.

Denver and Colorado Springs, CO.
ICC Decision: Denver & Rio Grande Western

Hobart to Mangum, OK.
ICC Decision: Southwestern Oklahoma Railroad Co.

Little Rock to Perry, AR.
ICC Decision: Little Rock and Western Railway Co.

Pulaski-Little Rock-Hazen, AR., Hot Springs Jct. to A.P. Green, AR.
ICC Decision: Missouri Pacific (MP)

Haskell to Hot Springs, AR., Malvern to Butterfield, AR.
ICC Decision: MP

Topeka, KS.-St. Joseph, MO.-Atchison, KS., Herington to Salina, KS., Trackage Rights Herington to Topeka, KS.
ICC Decision: MKT

North Enid to Billings, OK., Chickasha-Anadarko-Richards Spur, OK.
ICC Decision: MKT

Appendix F

to June 20, 1980 Memorandum of RLEA

(FRA Affidavit)

I, James G. Gidding, being duly sworn deposes and says:

(1) I am Acting Chief, Financial Analysis and Administration Division, Office of National Freight Assistance Programs, Federal Railroad Administration.

(2) As such I am officially in charge of the administration of such division including (a) receipt and filing of applications; (b) maintenance of docket records; (c) the analysis of applications for financial assistance; (d) the docket file for Title V of the Railroad Revitalization and Regulatory Reform Act of 1976, the Emergency Rail Services Act of 1970 and other financial assistance programs; and (e) administration of recommendations for drawdowns of financial assistance which are approved by the administrator of the Federal Railroad Administration or his delegate.

(3) In my official capacity as Acting Chief, Financial Analysis and Administration division, Office of National Freight Assistance Programs, Federal Railroad Administration, I have examined or caused to be examined the records of this office and have determined that: (a) Richard B. Ogilvie, Trustee of the Property of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company did file an application entitled, "Section 511 dated January 10, 1980 for $75,000,000 Loan Guarantees for Milwaukee Railroad Employee Protection;" (b) said application was received by this office and entered on its records with Docket Number RFA 511-80-1 on January 11, 1980; (c) thereafter, upon examination of said application, and recommendations of the Office of Federal Assistance and Chief Counsel on March 3, 1980, a Financing Agreement was entered into between the Federal Railroad Administrator and the Trustee providing the $75 million of labor protection funds; and (d) subsequently, according to documents on file with this office, a Guarantee Agreement dated March 7, 1980 was entered into by and between the Administrator of the Federal Railroad Administration and the Federal Financing Bank.

(4) Subsequently, and pursuant to a Trustee Certificate bearing date of March 3, 1980 and identified as No. 180-C (4R/511) drawdowns were authorized by the Associate Administrator for Federal Assistance, as delegate of the Administrator for the purpose of providing the labor protection funding referred to in the following amounts on the dates shown:

Drawdown No. 1	$6.6 million	April 21, 1980
Drawdown No. 2	$9.1 million	May 14, 1980
Drawdown No. 3	$2.8 million	June 19, 1980

JAMES G. GIDDING

District of Columbia
City of Washington

Sworn to and subscribed before me this 19 Day of June 1980.

/s/ RAY BOGLE
My commission expires May 1, 1982

Exhibit 1

to Supplemental Memorandum of RLEA,

letter and attachments

dated October 22, 1980

UNITED STATES OF AMERICA
RAILROAD RETIREMENT BOARD
844 Rush Street
Chicago, Illinois 60611

October 20, 1980

Mr. John O'B. Clarke, Jr.
Highsaw, Mahoney & Friedman
Suite 210
1050 Seventeenth Street, N.W.
Washington, D. C. 20036

Dear Mr. Clarke:

Enclosed herewith is the information in the possession of the Board that you requested as to the statistical breakdown of (1) the number of individuals employed by the Chicago, Rock Island and Pacific Railroad (A) in both August and December 1979, (B) in August 1979 and employed by another rail carrier in December 1979, and (C) in August 1979 and not employed by any rail carrier in December 1979, and (2) the same three categories of individuals reduced by the number of individuals who, as of September 30, 1980, either (A) were receiving unemployment insurance benefits under the Railroad Unemployment Insurance Act, or (B) had applied for railroad retirement benefits under the Railroad Retirement Act of 1974. As you are aware, the maximum amount of unemployment insurance benefits an individual can receive in a 2-week registration period is $250; $25 per day for 10 days out of each 14-day registration period.

The information contained in the accompanying document was derived from information contained in records of benefit payments and compensation by our Bureaus of Unemployment and Sickness Insurance and Data Processing and Accounts. The information was compiled and maintained in the normal and routine course of the Board's official duty.

As Secretary of the Board, the undersigned has custody of enclosed material and has affixed the seal of the Board thereto in certification that it is a true and accurate copy of records in the Board's possession.

Very truly yours,

/s/ R. F. Butler
For the Board
R. F. Butler, Secretary

Enclosure

Statistical data on certain individuals employed by the Chicago, Rock Island and Pacific Railroad

	Column I *Before Purge of Records*[1]	Column II *After Purge of Records*
Employees in Service August and December 1979—working in both months for the Rock Island Railroad	8,407	4,718
Employees in Service August 1979—working for the Rock Island Railroad December 1979—working for another railroad	312	281
Employees in Service August 1979—working for the Rock Island Railroad December 1979—not working for any railroad	994	670
Total	9,713	5,669[2]
340 employees with Railroad Retirement Board claim numbers		
3,704 employees drawing unemployment insurance benefits under the Railroad Unemployment Insurance Act[3]		
4,044 total number of individuals to be eliminated from initial column of statistics		
5,669 employees remaining		
9,713		

[1] The purge consisted of the elimination of 4,044 individuals from Column I: 340 former Rock Island Railroad employees with retirement claim numbers; and 3,704 Rock Island Railroad employees who as of September 30, 1980, were drawing unemployment insurance benefits.

[2] This number includes nine individuals who have filed for unemployment insurance benefits but who are ineligible for benefits.

[3] The maximum unemployment insurance benefit during each two-week registration period is $250; $25 per day for a maximum of ten days during the 14-day registration period.

Exhibit 2

to Supplemental Memorandum of RLEA,

letter and attachment

dated June 19, 1980

UNITED STATES OF AMERICA
RAILROAD RETIREMENT BOARD
844 Rush Street
Chicago, Illinois 60611

June 19, 1980

Mr. John O'B. Clarke, Jr.
Highsaw, Mahoney & Friedman
Suite 210
1050 Seventeenth Street, N.W.
Washington, D. C. 20036

Dear Mr. Clarke:

Enclosed herewith is the information in the possession of the Board that you requested as to the statistical breakdown of Chicago, Rock Island and Pacific Railroad employees who are currently receiving unemployment insurance benefits and those who have exhausted unemployment insurance benefits for the current benefit year.

The information contained in the accompanying document was derived from information contained in records of benefit payments by our Bureau of Unemployment and Sickness Insurance. The information was compiled and maintained in the normal and routine course of the Board's official duty.

As Secretary of the Board, the undersigned has custody of the enclosed material and has affixed the seal of the Board thereto in certification that it is a true and accurate copy of records in the Board's possession.

Very truly yours,

/s/ R. F. BUTLER
For the Board
R. F. Butler, Secretary

Enclosure

Report of Rock Island Railroad Employees Currently Claiming Unemployment Benefits Under the Railroad Unemployment Insurance Act

The maximum number of days for which normal unemployment benefits are payable in a benefit year is 130. The general benefit year begins July 1 and ends June 30. Depending on his years of service, an employee may be eligible for extended benefits upon exhaustion of his normal benefits.

There are 2,557 Rock Island employees currently claiming unemployment benefits under the Railroad Unemployment Insurance Act. Of those employees, 882 have less than 120 service months and are currently claiming normal benefits. They will not be eligible for extended benefits, but may be qualified for 130 days in normal benefits when the new benefit year begins July 1.

There are 396 employees currently claiming normal benefits who have 10 but less than 15 years of service. Those employees would be eligible for 65 days in extended benefits upon exhaustion of their normal benefits. The new benefit year would begin for these employees after their extended benefits are exhausted. They would then be eligible for 130 days in normal benefits and 65 days in extended benefits.

There are 1,236 employees with at least 15 years of service currently claiming normal benefits. They would be eligible for 130 days in extended benefits upon exhaustion of their normal benefits. When the new benefit year begins for them (after the exhaustion of extended benefits), they would be eligible for 130 days in normal benefits and 130 days in extended benefits.

There are 43 employees who have already exhausted normal benefits and are now claiming extended benefits. The ending dates of their extended benefit periods range from as early as July 1, 1980 to as late as January 1, 1981. When those employees exhaust their extended benefits,

they will again be eligible for 130 days in normal benefits. Upon exhaustion of those normal benefits, employees with 10 but less than 15 years of railroad service will be eligible for 65 days in extended benefits. Employees with 15 years or more of service will be eligible for extended benefits for 130 days.

There are 328 employees who have less than 10 years of service and who have exhausted normal benefits.

Exhibit 3

to Supplemental Memorandum of BLEA.

letter and affidavit

of Railroad Retirement Board Official

UNITED STATES OF AMERICA
RAILROAD RETIREMENT BOARD
844 Rush Street
Chicago, Illinois 60611

Office of the Secretary

I, R. F. Butler, Secretary of the Railroad Retirement Board, hereby certify that Mr. George A. Delaney is Director of Unemployment and Sickness Insurance of the Railroad Retirement Board, and as such has authority to speak with respect to the responsibilities and functions delegated to the Railroad Retirement Board under the Rock Island Railroad Transition and Employee Assistance Act.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Railroad Retirement Board on this 16th day of October 1980.

/s/ R. F. BUTLER
R. F. Butler
Secretary
Railroad Retirement Board

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No.

In the Matter of

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Debtor.

Appeals of:

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant-Intervenor.

State of Illinois, County of Cook, ss.

AFFIDAVIT OF GEORGE A. DELANEY, DIRECTOR OF UNEMPLOYMENT AND SICKNESS INSURANCE, RAILROAD REITREMENT [sic] BOARD

I, George A. Delaney, Director of Unemployment and Sickness Insurance, Railroad Retirement Board, being first duly sworn, depose and say as follows:

That by reason of the provisions of sections 106(e), 107, 108, 114, 115, and 119 of the Rock Island Railroad Transition and Employee Assistance Act, the Railroad Retirement Board is assigned certain responsibilities for the administration of the Act.

In order to implement and carry out its responsibility to accept applications and certify benefits to be paid by the Rock Island Railroad under an employee protection agreement under section 106 of the Act and to pay benefits directly to beneficiaries under section 119 of the Act, the Railroad Retirement Board must do the following:

1. Promulgate regulations for the adjudication of claims by the Rock Island employees for benefits or payments due them under the employee protection agreement mandated by section 106 of the Act and for new career training assistance payments provided for under section 119 of the Act; since no such agreement exists now, it would take the Rail-

road Retirement Board approximately three to six months from the date of such agreement to publish final agency regulations in accordance with such an agreement.

2. On the assumption that benefits provided for under an employee protection agreement will depend, in part, on an employee's status as an employee and his prior earnings as a Rock Island employee, the Railroad Retirement Board would have to obtain from the Rock Island Railroad wage and employment records of whatever type might be required for the adjudication of claims under the agreement.

3. Draft operating instructions and procedures for the guidance of Railroad Retirement Board employees assigned to the task of processing Rock Island employee benefit claims and to provide training for those employees. Some three months time would be required for this. Included here would be the consideration whether processing of claims could be performed by means of a computer processing system.

4. Draft employee benefit claim forms and secure the necessary approvals from the Office of Management and Budget; about 4-5 months time would be required for this.

5. Obtain funds for the payment of new career training assistance claims; it would likely take about six months to obtain the funds.

6. Publish an amended document for distribution to Rock Island employees describing in detail their rights under section 106, 107, 108 and 119 of the Act.

/s/ GEORGE A. DELANEY
George A. Delaney
Director of Unemployment and
Sickness Insurance

Subscribed and sworn before me
this 16 day of October 1980.

/s/ THOMAS W. SEALLER
Notary Public
My commission expires 1-10-83.

Affidavit of Trustee

dated June 5, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 B 2697

In the Matter of

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, Debtor, WILLIAM M. GIBBONS, as Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; and HENRY CROWN, et al., *Plaintiffs*,

v.

THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, *Defendants*.

In Proceedings for the Reorganization of a Railroad

AFFIDAVIT OF WILLIAM M. GIBBONS, TRUSTEE

This Affidavit is submitted in support of the Trustee's Motion for a Temporary Restraining Order against implementation of the Rock Island Act pending resolution of the constitutional questions raised in the Complaint filed as of this date. In support thereof, the affiant states as follows:

1. I, William M. Gibbons, am Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor, pursuant to an Order of this Court of March 28, 1975.

2. As Trustee, pursuant to the Order of this Court and Section 77 of the Bankruptcy Act, it is my fiduciary duty to preserve the assets of the estate for the benefit of its creditors.

3. Under an Order of this Court of January 25, 1980, it is my responsibility to proceed with the liquidation of this estate.

4. Under the Order of this Court of June 3, 1980, it is my responsibility to effect the abandonment of lines and discontinuance of service by the Rock Island Railroad. In connection therewith, this Court has prohibited me from entering into any agreements or obligations imposing labor protection costs on the estate.

5. Under Section 106 of the Rock Island Transition and Employee Assistance Act, which was signed into law on Friday, May 30, 1980, I may enter into a labor protection agreement with representatives of labor organizations which represent the former employees of the Rock Island.

6. If I do not enter into a voluntary agreement on behalf of the estate with labor representatives within 10 days of the Act's enactment—that is, by Monday, June 9, 1980—I will become subject to an order of the defendant Interstate Commerce Commission (the "Commission") to implement a labor protection arrangement imposed by the Commission.

7. Any involuntary arrangement imposed by the defendant Commission concerning labor protection under the Act will become an administrative expense against the assets of the estate. Under the terms of the Act, the cost of such an arrangement may amount to $75,000,000.

8. The $75,000,000 cost of the labor protection arrangement which may be imposed by the Commission will be imposed on the estate through an involuntary taking or loan guaranteed by the federal government which will be an administrative expense against the assets of the estate.

9. Under Section 106(b) of the Act, the defendant Commission will have jurisdiction to impose the labor protection arrangement commencing Monday, June 9, 1980.

10. The duties mandated of me by the Act to implement the labor protection arrangement imposed by the Defendant Commission directly conflict with my duties to preserve and liquidate the assets of the estate for the highest and best values obtainable and will dilute the value of those assets available for the creditors and shareholders.

11. The Act further provides that this Court shall order me to implement an Interstate Commerce Commission arrangement without review of that arrangement by this Court. Under the Act, there may be no stay of a labor protection arrangement imposed by the Interstate Commerce Commission by this or any other Court. The costs of the labor protection arrangement imposed by the Interstate Commerce Commission would have administrative expense status and would not be subject to judicial review prior to implementation. The Interstate Commerce Commission jurisdiction and the imposition by the Commission of a labor protection arrangement under the Act would thus result in irreparable injury to the estate.

12. The estate would also suffer irreparable injury by the implementation of a labor protection arrangement under the Act because the payments required would be to numerous individuals and would be recoverable only through numerous lawsuits if at all.

13. I have read the Complaint for Declaratory Relief and a Preliminary Injunction which was filed on this date in these proceedings, and state that the allegations as to the matters contained therein are true and complete to the best of my knowledge, information and belief.

Further affiant sayeth not.

/s/ William M. Gibbons
William M. Gibbons, Trustee
Chicago, Rock Island and
Pacific Railroad Company,
Debtor

Subscribed and Sworn to
before me this 5th day
of June, 1980.

/s/ Francis H. King
Notary Public

Affidavit of Trustee

dated October 10, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 B 2697

In the Matter of

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, Debtor, WILLIAM M. GIBBONS, as Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; and HENRY CROWN, et al., *Plaintiffs*,

v.

THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, *Defendants*.

In Proceedings for the Reorganization of a Railroad

AFFIDAVIT OF WILLIAM M. GIBBONS, TRUSTEE

William M. Gibbons deposes on his oath and states as follows:

1. I, William M. Gibbons, am Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor, pursuant to an Order of this Court of March 28, 1975.

2. As Trustee, pursuant to this Court's Order and Section 77 of the Bankruptcy Act, it is my fiduciary duty to preserve the assets of the estate for the benefit of its creditors.

3. Under this Court's Order of January 25, 1980, it is my responsibility to proceed with the liquidation of this estate.

4. Under the Order of this Court of June 3, 1980, it is my responsibility to effect the abandonment of lines and discontinuance of service by the Rock Island Railroad. In connection therewith, this Court has prohibited me from entering into any agreements or obligations imposing labor protection costs on the estate.

5. Under Section 106 of the Rock Island Transition and Employee Assistance Act, as amended by the Staggers Rail Act of 1980, I must enter into a labor protection agreement with representatives of labor organizations which represent the former employees of the Rock Island, if at all, within 5 days of the enactment of the Staggers Rail Act of 1980.

6. If I do not enter into a voluntary agreement on behalf of the estate with labor representatives within 5 days, I will become subject to an order of the defendant Interstate Commerce Commission (the "Commission") to implement a labor protection agreement imposed by the Commission. The Commission must act within 15 days of the enactment of the Staggers Rail Act.

7. Any involuntary arrangement imposed by the defendant Commission concerning labor protection under the Act will become an administrative payable out of the assets of the estate. Under the terms of the Act, the cost of such an arrangement may amount to $75,000,000.

8. The $75,000,000 cost of the labor protection arrangement which will be imposed by the Commission will be imposed on the estate through an involuntary taking or loan guaranteed by the federal government which will be a administrative expense against the assets of the estate.

9. The duties imposed upon me by the Act to implement the labor protection arrangement imposed by the defendant Commission directly conflict with my duties to preserve and liquidate the assets of the estate for the highest and

best values obtainable and will dilute the value of those assets available for the creditors and shareholders.

10. The Act further provides that this Court shall order me to implement an Interstate Commerce Commission arrangement. The costs of the labor protection arrangement imposed by the Commission would have administrative expense status and would not be subject to final judicial review prior to implementation. The Interstate Commerce Commission jurisdiction and the imposition by the Commission of a labor protection arrangment [*sic*] under the Act would thus result in irreparable injury to the estate.

11. The Act imposes a timetable whereby within 15 days after its enactment, the terms of a labor protection arrangement will be imposed by the Commission. The Act directs the Court to immediately implement the Commission's labor protection plan. Within 16 days, the Rock Island estate will thus be exposed to a $75,000,000 obligation and be required to make labor protection payments immediately.

12. Many of the suppliers, other railroads and providers of various services necessary to effect an orderly disposition of the assets of the estate are themselves administrative expense or pre-reorganization creditors of the Rock Island estate. With the addition of a $75,000,000 expense of administration claim, many of these individuals and businesses are likely to become unwilling or unable to extend further credit to the Rock Island estate. The imposition of this debt therefore will seriously affect my ability to effect an orderly liquidation of the estate and to realize its highest value for the benefit of its creditors and shareholders.

13. The estate would also suffer irreparable injury by the implementation of a labor protection arrangement under the Act because the payments would be made to numerous individuals and would be recoverable only through numerous lawsuits, if at all.

14. As a result of the Act the estate will be required to borrow funds from the United States pursuant to Section 110 of the Rock Island Act to meet this labor protection obligation. Those funds can be advanced only if they are awarded priority status. That $75 million loan will become a claim against the estate which must affect the prospects for an orderly liquidation of the railroad for it is unlikely that any disposition of other claims against the estate can occur prior to a resolution of this claim.

AND FURTHER, AFFIANT SAYETH NOT.

WILLIAM M. GIBBONS, Trustee,
Chicago, Rock Island and
Pacific Railroad Company,
Debtor

SUBSCRIBED and SWORN to
before me this 10th day
of October, 1980.

Notary Public

Affidavit of Trustee

dated October 28, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 B 2697

In the Matter of

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Debtor.

In Proceedings for the Reorganization of a Railroad

AFFIDAVIT OF WILLIAM M. GIBBONS, TRUSTEE

This Affidavit is submitted in support of the Debtor's reply brief in the above entitled proceeding. In support thereof, the affiant states as follows:

1. I, William M. Gibbons, am Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor, pursuant to an Order of March 28, 1975 of the United States District Court for the Northern District of Illinois, Eastern Division, Case No. 75B2697 ("Reorganization Court").

2. As Trustee, pursuant to the Order of Court and Section 77 of the Bankruptcy Act, it is my fiduciary duty to preserve the assets of the estate for the benefit of its creditors.

3. I have read the "Supplemental Memorandum of Railway Labor Executives' Association in Support of Stay of Preliminary Injunction Pending Appeal" and the attached Exhibits, including the affidavit of George A. Delaney, Director of Unemployment and Sickness Insurance, Railroad Retirement Board ("RRB"). I disagree that the estate will not sustain any irreparable harm if the stay request is granted for the reasons below set forth.

4. The most glaring misstatement contained in the aforementioned Supplemental Memorandum is RLEA's contention that "before the Trustee can be required to pay any

benefits under the arrangement, the RRB must determine the amounts due and 'shall certify such amount to the Rock Island for payment'." When an arrangement has been imposed on the estate, it is erroneous to assume that the Trustee would not be required to pay benefits or allowances until the RRB first determines and certifies the amount due employees for payment. If the Trustee faces an experience similar to Milwaukee Road's experience under the Milwaukee Railroad Restructuring Act (45 U.S.C. 908) and companion Milwaukee Agreement, the Trustee would be requested by separated employees and would be required to immediately pay benefits and allowances irrespective of any certification by the RRB.

If an agreement is reached by the parties or imposed by the Interstate Commerce Commission pursuant to Section 106(b) of the amended Act, it is presumed that such an agreement will be a "fair and equitable" arrangement as defined therein to mean "no less protective of the interests of employees than protection afforded under Section 9 of the Milwaukee Railroad Restructuring Act. . . ." By reason thereof, such an agreement might contain, among other things, provisions for separation allowances similar to the Milwaukee Agreement which provide for a separation allowance to each separated employee "in an amount equal to $2,000 for each year of completed service", [*sic*] with a total amount "not to exceed $25,000." Separation allowances at Milwaukee were paid on an expeditious basis irrespective of any RRB involvement or promulgation of regulations regarding implementation of other benefit features in the protection agreement. Based on the Milwaukee experience, the Trustee, under similar imposed protection agreement circumstances, would be required to pay benefits almost immediately to former employees requesting separation allowances in accordance with the agreement. Consequently, Rock Island's estate, contrary to the RLEA's position in its memorandum which purports to show the opposite, would sustain immediate and irreparable harm.

Exhibit 1 hereto clearly points up the immediate costs confronting the Trustee if he is required to implement an employee protection agreement containing provision for separation allowances. This exhibit demonstrates that an initial separation allowance payment by the Trustee, based on the very statistics furnished by the RLEA and RRB, approximates $46,065,000.

5. It is important to consider the Milwaukee experience in the context of the limited administrative burden that RRB has in the ultimate process of distributing benefits. According to information supplied by the Milwaukee Railroad, its Systems Department prepared detailed earnings tapes for all employees for a twenty-nine month period. The payroll tapes were then sent to the RRB. Also sent to the Board was a tape file which showed the name, Social Security Number, Union code, and starting date and seniority date of each employee. The RRB returned a tape to the Milwaukee Road, showing for each employee, the average straight time earnings for a twenty-nine month period of time, and the straight time earnings for each of the twenty-nine months. The work performed by the RRB in the Milwaukee situation, and which would be similar in the case of the Rock Island, did not take two or three months. According to available information, the type of work involved took three to four weeks to complete, and not two to three months suggested by the RLEA's Supplemental Memorandum. RRB's burden, consequently of assembling data is almost inconsequential since the railroad supplies such data expeditiously.

6. Also, on information and belief, the RRB never promulgated regulations pertinent to the implementation of benefits or disputes arising over the calculation of payment of benefits. Such regulations appeared unnecessary and may be unnecessary in Rock Island's case.

7. Further, on information and belief, an overwhelming majority of separated employees at Milwaukee Road opted

for separation allowances instead of interim employee assistance benefits, and such allowances were paid almost immediately in accordance with the terms of the Milwaukee Agreement. If a similar agreement were to be imposed on the Rock Island Trustee, the experience at Rock Island would be the same.

8. The same procedures and time frame will govern at the Rock Island if the Trustee is required to enter into and implement an employee protection agreement pursuant to the Rock Island Railroad Transition and Employee Assistance Act, as amended, with immediate and irreparable harm to the estate.

9. I have read the above affidavit and state that it is true to the best of my knowledge, information and belief.

Further affiant sayeth not.

William M. Gibbons, Trustee
Chicago, Rock Island and Pacific
Railroad Company, Debtor

Subscribed and sworn before me
This 28 day of October, 1980.

Notary Public
My commission expires:

EXHIBIT 1

Separation Allowance Criteria Under the Milwaukee Employee Protection Agreement

Under the Milwaukee Employee Protection Agreement, a separation allowance shall be payable to a separated employee in an amount equal to $2,000 for each year of completed service, except that the total amount of separation allowance payable to a separated employee shall not exceed $25,000.

At Milwaukee, any separation allowance of $8,000 or more was paid in the following manner: (1) 75% of such amount was paid at the time the employee was separated; and (2) the remaining balance is payable on or about July 1, 1981 on a pro-rata basis if the total amount of all separation allowances exceeded $75,000,000.

Example: Application of Milwaukee Separation Allowance Criteria at the Rock Island

Assuming that approximately 3,700 Rock Island employees in service as of August 1, 1979, are now drawing United States Railroad Unemployment Insurance Benefits (as indicated by the Railroad Retirement Board) and, assuming further, that said number of employees each have an average of 12½ years of seniority at Rock Island, the following formula/calculation applied at Milwaukee in the distribution and payment of separation allowances might apply with equal force at Rock Island if a similar arrangement is imposed on the Trustee by the Interstate Commerce Commission pursuant to Section 106(b) of the Rock Island Railroad Transition and Employee Assistance Act, as amended.

MAXIMUM 12½ YEARS SERVICE = $25,000 SEPARATION ALLOWANCE

75% of $25,000 when separated =	$ 18,750
3700 eligible employees at $18,750 =	69,375,000
12 months X RRUI $525 = $6,300 X 3,700 =	$23,310,000
Total 75% Separation Allowance Payout =	$46,065,000
Maximum Trustee Funds =	$75,000,000
Less Separation Allowance Payout	46,065,000
Balance Trustee Fund For Further Payments =	$28,935,000

Summary:

The Trustee of the Rock Island estate, under Milwaukee type conditions, would face an immediate liability of $46,065,000 if 3,700 Rock Island employees opted for separation allowances in lieu of other benefits under an employee protection arrangement.

Hearings and Orders Relating

To Preliminary Injunctions

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 B 2697

In the Matter of:

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Debtor.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled matter before the HONORABLE FRANK J. MCGARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Monday the 9th day of June, 1980, at the hour of 10:00 o'clock a.m.

* * *

[6] THE CLERK: 75 B 2697, in the matter of the Chicago, Rock Island & Pacific Railroad Company, Debtor, et. al., versus the United States of American, et al. Hearing on motion for a temporary restraining order and preliminary injunction (Trustee, Continental Bank, First National Bank, Crown et al.).

THE COURT: Good morning, Mr. Manos.

MR. MANOS: Good morning, your Honor.

[7] THE COURT: Good morning, gentlemen from Washington. I see you got here bright and early this morning. I appreciate your coming out on such short notice.

MR. MANOS: Your Honor, a brief has been submitted to the Court. This being a brief of ——

MR. RUSH: Can I get a copy of the brief?

MR. MANOS: A brief was submitted earlier this morning.

THE COURT: I have seen it. I have held it in my hand, I have dipped into it, but I can't say I've done much more

than that. I've skimmed through it, Mr. Manos, so I have a general familiarity with the points you've raised.

What precisely is the relief you seek this morning?

MR. MURRAY: Your Honor, may I make one statement for the record?

THE COURT: Yes, Mr. Murray.

MR. MURRAY: About the brief we filed this morning, your Honor. Obviously we're operating under great time pressures here and we prepared this brief over the weekend, and we have additional copies with clean-ups of typographical errors which appear in the brief and it should be here in about ten or fifteen minutes, and then we'll have additional copies for all of the counsel of record. We [8] supplied copies this morning to Mr. Rush and Mr. Broadley, but we will have final corrected copies this morning to substitute in the record, if your Honor would grant us leave to do that.

THE COURT: You may do that.

MR. MURRAY: Thank you, your Honor.

MR. MANOS: Your Honor, what is sought here this morning is a temporary restraining order on the I.C.C. and on the Secretary of Transportation from proceeding Acts which are prescribed under the Rock Island Act, a copy of which has been furnished to the Court, along with the pleadings that have been filed in connection with the complaint for declaratory judgment and for preliminary injunction.

Your Honor, the injunctive relief which is sought here is appropriate and necessary to protect this Estate, and unless the injunctive relief by way of a temporary restraining order is entered today, and ultimately by preliminary injunction, the power of this Court to consider the constitutional aspect of the Act and what is permissable under the Act will be taken away from this Court, will be placed

in an arena where the Trustee and the creditors say due process is extinguished, and there is set in motion then the very Acts that we say are unconstitutional here. In other words, the [9] uncompensated taking, which in essence is the $75 million imposition of a claim against the Estate, in a situation where there is no public interest, where the purpose as stated, if the Act is not a correct purpose, the Rock Island has been ordered to terminate all of its operations and to abandon its system, the I.C.C. has said that it must do so, or has recommended that it do so, the Court has adopted that finding and has ordered that all systems be abandoned, that there be a total cessation of operations, that there is no labor protection, and the Court by its very utterances on June 2nd, on the record, made amply clear that that is no longer a concern as far as this Estate is concerned, which now must distribute its assets to the creditors. It's no longer deeply concerned, although it did express a continuing interest in what happens to the public. But, as far as the Estate is concerned, it must be preserved and distributed without dilution and there must be the highest and best benefits achievable by the Trustee in this liquidation.

Consequently, when Congress enacted this Act and stated as a public purpose that it must grant $75 million to labor, and I misuse the word "grant," this is a burden on the Estate, this is a claim now that is generated that must be paid out of the Estate, when it said that this claim must be paid out of this Estate as [10] a burden, it currently said that the reason that this has to be done is that there is a public interest of the necessity of continuing the operations of the Rock Island where these operations are central, but there is no logical connection, Judge, between what Congress said was a public interest and what truly is public interest here. The public interest has already been served. Your Honor has witnessed months and months of directed service, where the FRA, where the I.C.C. attempted to filter and sift what is the public interest. In other words, what carriers are interested in buying por-

tions of the Rock Island so as to continue this public interest.

Now, it has happened, we know where the expressions of interest are. We also know that this Estate is not going to continue in operation. As far as the public interest in this Estate is concerned, this public interest now has been transferred to the other carriers that may at some later time, hopefully, take over the lines of the Rock Island and employ some of the employees of the Rock Island, hopefully under the conditions that were established by an agreement that was reached between the Unions and the carriers and known as the Miami Accord.

Consequently, Congress was absolutely wrong in saying that there was a public purpose and a necessity for the imposition of a claim on this Estate in the public [11] interest, and therein lies the basis of the Trustee and the creditors saying that this is an uncompensated taking under the Fifth and Fourteenth Amendments to the Constitution.

In a climate where the Court has already decided that constitutionally it was mandated that this operation should cease, that constitutionally the creditors are entitled to a liquidation of the assets and a liquidation of the assets now, without any dilution on a claim which Congress now says must be imposed, and incidentally imposed ex post facto.

Now, Your Honor, due process is threatened here today unless a temporary restraining order is entered. My remarks, Your Honor, I will not go over each facet of the argument that is so cogent to the ultimate determination of the constitutionality of the Act, but what I'm addressing today are the important elements that the Court must deal with in connection with a temporary restraining order.

Due process is threatened here today because today is the date that the I.C.C. triggers its decision on labor protection, and it's mandated to do so under the Act. Ten days have gone by since the enactment of the statute. The Com-

mission on Friday served Mr. Gibbons with a notice and said look, you're required to submit [12] the matter now to the Commission because you weren't able to agree on a negotiated settlement with the Unions, and the Union representatives and the employee representatives. Consequently, Mr. Gibbons now has been given a long laundry list of what the Commission needs in order that it must reach a decision within 20 days. The Act says the decision must be reached within 30 days of the enactment. So now the Commission has 20 days to do so, wherein lies now the deprivation of due process. If the Commission, as it will, it already has announced through its general counsel what its decision is going to be in a letter to Senator Kassebaum, already announced it, when the Commission imposes its burden within the 20-day period, what it set in motion is a process that takes away the power of this Court to examine the constitutionality of this Act. It compels your Honor to order this man, the Trustee, to implement the order, and conceivably the assets of this Estate at that stage can be ordered to be paid in implementation of labor protection. It is also conceivable then that as soon as this order is entered, since there is no stay, since your Honor is mandated, without even the authority given it to examine a claim and to adjudicate it, now mandated, without having the opportunity to examine into the validity of the claim, mandated to tell Mr. Gibbons to go ahead and pay it out [13] now, this is it, you pay it out of the assets of the Estate, or if there is not enough assets that have been liquidated so far, then you go to the FRA and you take that loan, because Congress has told me that I must force you to do it, and Congress forces me to tell you to go take the money and pay it out.

I'm not finished with the due process deprivations, because then the Act says the only appeal that can be taken, this Court can't stay, incidentally, the action of the Commission, but the only appeal that can be taken is to the Seventh Circuit, and that appeal, in a steamroller fashion, has to be terminated or adjudicated in 60 days. But, there

is no stay in the interim of the implementation of the Act. The Seventh Circuit now may or may not be able to render an informed judgment. It doesn't have before it the five long years of experience, and when I say long years, comparatively long in the history of railroad reorganizations, or I should say comparatively short, but nevertheless, five long years of administration here, and the record is not before the Seventh Circuit Court of Appeals, and even if presented to it, the Justices in the Seventh Circuit are going to have to wade through the five years of administration to see whether the Trustee and the creditors have any kind of a merit to their claim and then steamroller [14] determinations must be made, and then the money maybe is gone, and even if the Act is confirmed at that point and found to be constitutional, the irreparable harm has set in. But, most certainly the due process has been extinguished.

Other big elements relative to the due process is that this irreversible procedure which this Act, in a very subtle but insidious way has done here, what happens is that the Supreme Court has no power of review, because Congress said this is a very selective case, this can't be reviewed by the Supreme Court, only on a steamroller Seventh Circuit Court of Appeal's decision in a 60-day procedure.

What occurs then, unless this Court acts to stop the process in mid-air by a temporary restraining order and ultimately on a preliminary injunction, what happens is that this Estate, the Trustee, the creditors, are deprived, like any other citizen, of at least making an application to the Supreme Court to see whether the Supreme Court has something to say relative to what the Seventh Circuit has said about the constitutionality of the statute. As far as any harm to anybody else, if the order is entered here today, clearly there is no injury to anybody else, because this Court, if it makes an up-front determination relative to the constitutionality [15] of the Act, is subject to a review by the Seventh Circuit, is subject, as it should be,

to a review by the Supreme Court. So, how is anybody hurt? The Trustee, however, and the creditors, your Honor, are hurt by the steamroller, the headlong plunge into an early determination and early payment of a claim out of an estate where this Court has no right as a District Court in charge of the reorganization process all of these years, and still having so an exclusive jurisdiction over claims, has been effectively deprived of the adjudication problem to determine the claims, to determine their validity under the applicable sections of Section 77 of the Bankruptcy Act.

• • •

[23] [MR. MURRAY:] Your Honor, this matter this morning presents issues that are critical, not only to the Rock Island Estate, but I submit are critical in the course of legislation involving Section 77 of the Bankruptcy Act [24] and the Railroad reorganization proceedings, and also in terms of the evolution of the development of the case law under the Fifth Amendment to the Constitution respecting the relationship between the rights of private property and public use, and indeed we believe very critical issues are presented here by this extraordinary piece of legislation which has been enacted by the Congress and signed by President Carter into law on Friday, a week ago, May 30th.

This legislation purports to be Washington, D.C.'s response to the problems of the Rock Island. But, once again, I'm sorry to say, we find that Washington's solution to the problems of the Rock Island, and to the problems of Midwest railroads in general, turns out to be quite barren and really no solution at all.

Your Honor, at the June 2nd hearing on abandonment of the Rock Island I summarized the history of these proceedings, especially as they relate to the issue of labor protection, and I don't propose to cover that ground again. I do want to highlight what was said then and what was repeated again this morning by Mr. Manos, and that is that the Estate of the Rock Island has already suffered losses

of over $150 million between March of 1975 through the summer of 1979, and that those losses had the effect of preserving the jobs of Rock Island [25] employees for four and a half years. I want to repeat, or highlight again the fact that during all of this period the Trustees made valiant efforts to effect work changes and productivity improvements that were met with resounding rebuffs from the Labor Unions, and that despite the Trustee's critical cash shortage, BRAC and the UTU struck the Rock Island in August of 1979, thereby causing the Trustee to become cashless. Despite a Presidential Order, back to work order, BRAC and the other Unions defied the clear mandate of the Railway Labor Act and refused to order their members to return to work, and the Government of the United States failed to do anything to enforce that back to work order. Even when directed service was ordered by the I.C.C., the I.C.C. and the Government bent to the demands of labor unions who insisted on bringing back all the employees to work, even though they weren't needed, at the onset of directed service, and this at immense expense to the Government and to the taxpayers. Indeed, Rock Island employee jobs were preserved for another eight months at a cost of $70 million to $80 million. That's just the factual background that really precedes the enactment of this legislation.

Well, today we are faced with a new initiative by the Government in which railway labor is [26] given new rewards for their conduct in these proceedings. I think it might be useful just very briefly to review the course of this legislation. The matter was first broached in the Congress earlier this year, really in late winter. At that time the creditors and the Trustee visited Washington, D.C., and we voiced our willingness to the Senate Committee and to representatives of the House to arrive at a constructive legislative solution for the Rock Island problem. We offered to meet with anyone at any time at any place to resolve the difficult problems that are faced by this Estate and by Mid-

west railroads in general, and I repeated that offer in this courtroom, your Honor, at several status reports. Unfortunately, apart from one meeting which the creditors and the Trustee had the Department of Transportation, we received no significant response to our efforts to work out a constructive solution to the Rock Island problems. There was one exception, and that exception was the staff and the members of the Senate Commerce Committee, who I believe tried hard to work out a solution and, unfortunately weren't able to do so, because the fact of the matter is that political exigencies in an election year prevailed over good sense and the establishment dictate of our Constitution.

So, your Honor, we are faced with the [27] Rock Island Employee Assistance & Transition Act, whose constitutionality is being tested today. In essence, that Act provides for an immediate taking of $75 million as a prior claim on the Rock Island Estate that will displace the interests of the creditors and the shareholders, and that claim on the Rock Island Estate exists today as a result of the enactment of the legislation. What is so unusual about this legislation is the impact that it has on private property, and that is the reason why I think it is so critical in the history of the relationship of private property and public use.

I think we are all accustomed in an election year to efforts to appropriate large sums of hard-earned taxpayers' money from the public till to fund politically opportune projects, the proverbial legislative pork barrel. But, what I think is so extraordinary, and I submit also deeply troubling about this legislation, is that it seeks not to tap the public till, but private property, so that the [A]dministration and Congress can win the favor of labor unions in an election year, and it's that kind of abuse of Government again which the Fifth Amendment is designed to protect.

We have in this country an elaborate welfare and unemployment scheme to assist those unfortunate workers who suffer a loss of their jobs. Here, though, [28] we have a

special form, an extraordinary form of unemployment compensation far beyond what any other American worker in any other industry is entitled to receive. And why? Because the Congress as we see in the findings to the Act, the Congress has determined that the Rock Island services are essential to Midwest rail transportation and the Midwest economy, even though, in the last five years, neither the Administration nor the Congress has been willing to put any significant sum of money into the Rock Island Estate to preserve the Rock Island operations in the Midwest.

Then Congress states the findings in the preamble to the Act, the lynch pin of their whole reasoning:

> "Uninterrupted continuation of services over Rock Island Lines is dependent on adequate employee protection provisions covering Rock Island Railroad employees who are not hired by other railroads."

We have two groups of employees we have to consider here. One is the Rock Island employees who will be employed by other railroads who will acquire lines of the Rock Island, and it's those lines that are acquired that really are the lines that are essential to the national interest. The lines in which other railroads have expressed an interest are those. They are not covered by this Act, they are covered by the Miami [29] Accords that were voluntarily entered into by the acquiring carriers and the Labor Unions. Then we have the employees who are not or will not be hired by the acquiring carriers, those who will lose their jobs when directed service ends. Regrettably, they are surplus, their services are not essential, they are superfluous. That is why they do not have a job with acquiring carriers, and they are the employees the Act, by its own terms, protects.

A comparable example, your Honor, I submit, would be if the Chrysler Corporation went out of business, then Congress said that our national automobile industry was

essential to the national economy, we have to keep Ford and G.M. in business, so we pay off the Chrysler workers to preserve their—to give them employee severance. It doesn't make any sense. There's only one way in which I can understand the Congressional finding, and that is that Congress is afraid that unless they provide for protection for former Rock Island employees who do not have a job with acquiring carriers, they will face a strike by those employees who do have a job with acquiring carriers, and I think there is ample evidence of that. There is a report in the April 7th, 1980 edition of Traffic World in which Mr. Fred Kroll, the President of the Brotherhood of Railway Clerks and Chairman of the Railway Labor Executive Association is [30] quoted as saying that there will be a strike not only over the Rock Island, but over all carriers operating over Rock Island Lines unless there are assurances that the legislation will be enacted. Mr. Kroll says that labor will, "Take every legal means to protect our people." He added that, "The [*sic*] Rock Island employees are deeply upset, they may take the law into their own hands. That may mean violent action or vandalism." Mr. Kroll went on to say, "Not only will the service over the Rock Island be in jeopardy, but so will the service of other lines coming in to operate Rock Island Lines." Then he says, "Everybody got what they wanted, the shippers got their service, the railroads got new business and routes, the Government got its orderly transfer, the only ones who didn't get what they wanted were labor. I can't visualize those people sitting still for that." And then he said, "We won't have to call a strike, the Rock Island people will fan out across the property and halt the other 17 roads. We're losing the handle on this situation."

Your Honor, I think this is the sense in which the Congressional finding should be understood. If the former Rock Island employees who do not have a job with acquiring carriers do not receive labor protection, that there is going to be a strike, that is the threat, and once again, this

Government and the Rock Island Estate, [31] against its will, is going to be held hostage by the Labor Unions. This Estate should not be compelled to pay protection to labor unions that are responsible for its demise, and that is precisely what is happening here. It's clear from the Congressional Record that some members of Congress were clearly troubled by the constitutionality of this legislation, and well they should have been, given this background. Senator Kassebaum's remarks, and it's reported in the May 22nd, 1980 Congressional Record at Page 5806:

> "Although all the funds will be considered a claim of the administration, I'm pleased to note that the House conferees agreed to language which insures that this legislation will not result in an unconstitutional taking against the Rock Island Estate. Creditors of the Estate will still maintain the right to argue the question of the existence of labor protection. However, it's important to note that regardless of the disposition of the validity of the labor protection responsibility of the Estate, Rock Island employees are guaranteed their labor protection entitlement."

Your Honor, we do not understand Senator Kassebaum's remarks. We think it's clear that the Congress was concerned about the constitutionality of this [32] legislation. They obviously thought that there had to be some appeal, we understand that an earlier draft of the legislation, in that earlier draft that no appeal was provided for at all. But, it's clear, as Mr. Manos pointed out, that what we have here is a very accelerated process of appeal and it suggests the uncertainty that the Government itself had about the constitutionality of their own legislation. We think their doubts are well founded. Even if we were to concede that a valid public purpose is served by this legislation, a Fifth Amendment taking is still committed by the Government, because it's an uncompensated taking of private property for public use.

The Act is very clear, that there is no liability on the part of the United States Government for the labor protection claim that is going to be imposed on the Rock Island Estate, and therefore there can be no compensation under this Act for the taking that will occur. As Justice Holmes stated in the landmark case of Pennsylvania Coal Company versus Mann, 260 US 393, the general rule at least is that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop conflagration, and if they do go beyond the [33] general rule, whether they do not stand as much upon tradition as upon principle, in general, it's not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbors' shoulders. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

In other words, if the Congress is concerned that there will be a rail strike as a result of the failure to make protection payments to the Rock Island employees, if that is a national concern, that burden should not fall upon the Rock Island Estate, that burden should fall upon the public treasury, even if it be sound public policy, which we dispute, that burden should fall upon the public treasury and not on the pockets of the Rock Island creditors and shareholders.

The plain fact of the matter is that this Court has ruled that the Rock Island no longer has a common carrier obligation to conduct rail services, that indeed the moment of constitutional taking has come, and that, in the words of Justice Holmes in the Brooks-Scanlon case, a carrier cannot be compelled to carry on even a branch of business at a loss much less the whole business of carriage. If the plaintiff be taken to have granted [34] to the public an interest

in the use of the railroad, it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss. The fact of the matter is that this Court has ruled that the Rock Island Estate is now entitled to cease its rail operations, that the creditors and the shareholders are now entitled to withdraw their capital and their investment in this railroad, and that money therefore should not be expropriated for public purposes, whether valid or invalid.

Your Honor, our concerns are not simply limited to the $75 million labor protection obligation that is imposed upon the Rock Island Estate. We also have very serious concerns about the extensions of directed service that are provided for in this legislation, including a two-year extension of directed service over the Rock Island Commuter Lines. We are also concerned about provisions in the Act that preclude downgrading of the Act, and we note in our brief some of the problems in the draftsmanship of that legislation and precisely what is involved there, but the plain fact is that this legislation, in its total, in its entirely, has the cumulative effect through the $75 million labor protection imposition, through the extensions of directed service, through the prohibition on downgrading and abandonment of lines, it has the cumulative effect of impairing the [35] ability of the Trustee to dispose of the Rock Island Estate, and that is why there is irreparable harm to the Rock Island Estate from the moment that the legislation was enacted, and it continued today and it continues to accelerate with each passing day.

Now, your Honor, we submit that wholly apart from any concern about the I.C.C. action, a temporary restraining order and a declaratory judgment and a preliminary injunction have to be entered today because of this Court's responsibility as a reorganization Court under Section 77 of the Bankruptcy Act.

Your Honor, as the Supreme Court indicates the earlier Rock Island reorganization in Continental Bank versus

Rock Island Railroad, 294 US 648, Courts of Bankruptcy are vested with such jurisdiction of law and equity as will enable them to exercise original jurisdiction in bankruptcy proceedings. They are essentially courts of equity, and their proceedings inherently are proceedings in equity. The power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is therefore inherent in a Court of Bankruptcy as it is in a duly established Court of Equity. Section 262 of the Judicial Code, which authorizes the United States Courts to issue all writs not specifically provided for by statute, which may be necessary for the exercise of [36] their respective jurisdiction, recognizes and declares the principle, and, your Honor, we submit that this is essential in this case, because the Trustee at this point is now under conflicting obligations. This legislation which we submit is unconstitutional, compels the Trustee, on an extremely accelerated schedule, to implement the labor protection program set forth in the Act, and it compels the Trustee to continue directed service and it precludes the Trustee from downgrading various operations, all in conflict with the instructions of this Court to its Trustee to liquidate the Estate as rapidly as possible because of the dictates of the Fifth Amendment as expressed in the Brooks-Scanlon case and is embodied in this Court's order earlier this month.

Your Honor, we submit that you have jurisdiction sitting as a reorganization Court under Section 77 of the Bankruptcy Act to enter an order containing instructions to the Trustee declaring the Act unconstitutional and making it clear that this Estate cannot be burdened by the imposition of labor protection and the imposition of other burdens that will restrain the expeditious liquidation of this Estate that is constitutionally required.

Your Honor, we urge the entry of the order which we submitted to your Honor last Thursday.

THE COURT: Mr. Kaplan.

[37] MR. KAPLAN: Your Honor, I'll try to keep this very brief. We believe that the Rock Island Act is a classic example of election year legislation. It's an act which we believe is invalid on its face, but was passed for one purpose only, for Congress to be able to say that it confronted an issue and tried to do something about it. It's difficult for us to believe, however, that Congress, if it thought about constitutionality at all, really believes that this Act can pass constitutional muster. We believe that this Act not only violates clearly the provisions of the Constitution which indicates that Congress can only pass uniform Acts of Bankruptcy, but also clearly violates the Fifth Amendment prohibition against uncompensated taking, imposes a new obligation on the Estate which never existed before, and which this Court clearly indicates doesn't exist as of a week ago. It does so through a mechanism which has already been declared invalid and unconstitutional in this Circuit and in other circuits. It tries to impose a fourth borrowing on the Trustee to be imposed by the Court on a railroad which has been found to be unreorganizable. In also does this by imposing procedures which clearly violate due process and separation of power's doctrine. It orders this Court to impose any labor protection arrangements which the I.C.C. desires to impose, whether [38] rational, whether constitutional or whatever. It orders that there is no stay of either the I.C.C. order of this Court's order which must be imposed. It seeks to limit review and it limits compensation to the Estate.

Now, your Honor, finally this Act seems to try to effect a limitation on the Rock Island and the Trustee's right to dispose of property and to liquidate the assets of the Estate which this Court has already ordered.

Now, your Honor, in effect, we believe that this Act attempts to steamroll through a Congressional result on the Estate, and that this very steamroller aspect to the legislation mandates that the Court immediately enjoin the

Act. We believe that the momentum which legislation tried to impose, short timetables, by allowing no stay, by allowing no review, is something which has to be stayed and stemmed right at this moment before it gets into operation.

We also believe that it's unfortunate for the Trustee to be put into a position to have to choose between loyalty and his fiduciary obligations to the Court, and it would seem to me his various obligations under this Act. We believe that the Act will effectively hinder the liquidation effort of the Trustee, of the Estate at this moment, put them in a standstill, and as the [39] I.C.C. order, which Mr. Manos discussed earlier, requiring the Trustee to answer a laundry list requested by the I.C.C., indicates the Trustee's efforts will have to be directed and diverted to enforcement or to adherence to the legislation at a time when his efforts should be directed to the liquidation process.

Also, your Honor, we believe that that order immediately confronts this Court with the question of its jurisdiction versus the I.C.C.'s jurisdiction. The Trustee, under that order, seems to have four or five or six days to file something with the I.C.C. If he does, that may constitute submission to the I.C.C.'s jurisdiction, which we believe is totally improper under that Act, and we believe that the Court should immediately address that jurisdictional problem. Thank you, your Honor.

THE COURT: Mr. Moritz, are you going to add to those remarks?

MR. MORITZ: Yes.

THE COURT: Go ahead.

MR. MORITZ: I will be brief, your Honor. Most of what I have to say has been adequately covered by those counsel for the Trustee and the creditors who have spoken before me, and are contained in the joint memorandum that was submitted this morning.

[40] I might also say, your Honor, that on behalf of the First Mortgage Bondholders, we submit that this Act would create an interference with contractual rights that we have presently without any offsetting benefits to the Estate for all of the reasons that have been demonstrated in the presentation to you and are set forth in the briefs which support the fact that this is an unconstitutional taking. We had that as an additional reason for the Court setting this Act aside.

Your Honor, I think it's appropriate for us to clearly understand what Congress is doing with this legislation. On June 2nd, as the Court well knows, we had another in a series of orders entered by this Court which clearly established the principle, that the Rock Island Railroad, as an operating entity, should be out of the business of providing rail service. The Interstate Commerce Commission, as recently as last week, corroborated the Court's judgment and said it was in the public interest that we stopped bleeding the Rock Island Estate. There, I think, can be no question that were Congress to direct this Court to continue to permit the Rock Island Estate to operate until it had lost an additional $75 million, that that law would conflict with the due process provisions of the Fifth Amendment, and that law would be set aside by this Court because such a law would require [41] a violation of Brooks-Scanlon rights, rights that we have already established exist in this situation.

The piece of legislation that Congress passed does precisely that, your Honor. Congress said that it is in the public interest that the Rock Island continue to operate, and that is contained in Section 102 of the Act. Congress said in 102 of the Act that the obligation to keep operating, or the requirement to keep operating will only be met if labor is served. Congress then provides $75 million of Rock Island assets to serve labor, and Congress attempts to prevent the Government from being libel for that $75 million

taking by way of attempting, under Section 110 of the Act, to limit the Government's exposure to what is set forth in the Act.

What is set forth in the Act is that the Government must get cost of administration in the loan that it gives to the Trustee to fund this Act. So, in one fell-swoop they have Congress, in essence, saying the Rock Island Estate must provide $75 million in order to achieve a national objective. That, we submit, your Honor, is simply wrong. It's a violation of law and it's a violation that this Court should stop and should stop now. I will not repeat all of the arguments made to you with respect to why it's appropriate for the Court to act at this time. We note Section 105 [42] of Title XI of the Bankruptcy Code which provides very clearly that the Court has the right to enter an order in aid of its jurisdiction. We think at least to the extent of $75 million, its jurisdiction is being impaired.

Your Honor, I have other comments, I will forego making them. I will end with one analogy, and it's a little lengthly, but in 1951, when the Korean War was going on, there was a risk of a steel strike, and the reaction to that risk was an order, an Executive Order issued by the President and directing the Secretary of Commerce to seize the steel mills. Steel mills went into Federal District Court in an effort to prevent that unconstitutional taking from going forward. Judge Pine, later affirmed by the United States Supreme Court, said as follows in granting that injunction:

> "As to the necessity of weighing the respective injuries and balancing the equities, I'm not sure that this Congressional requirement for the issuance of a preliminary injunction is applicable to the case where the Court comes to a fixed conclusion, as I do, that defendants' acts are illegal. On such premise, why are the plaintiffs to be deprived of their property and required to suffer further irreparable damage until answers to

the complaint are filed and the cases are at issue and are reached [43] for hearing on the merits. Nothing that could be submitted at such trial on the facts would alter the legal conclusion I have reached."

But, assuming that he was required to balance the equities, Judge Pine found in favor of the plaintiff. He then went on to say, "If I'm to consider the public interest for another viewpoint, I believe that the contemplated strike, if it came, with all of its awful results, would be less injurious to the public than the injury that would flow from a timorous judicial recognition that there is no basis for this claim to unlimited and unrestrained executive power, which would be implicit in a failure to grant the injunction. Such recognition would undermind public confidence in the very edifice of Government as it's known under the Constitution."

As I indicated, Judge Pine was affirmed by the United States Supreme Court.

I submit, your Honor, that the restrictions on the reach of executive power are also restrictions on the reach of Congress. The Constitution is designed to limit illegal congressional action, and it's designed to limit illegal executive action, and I submit that like Judge Pine, this Court should restrain the Act of Congress, The Rock Island Employment Assistance & Transition Act now. Thank you.

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[45] [MR. RUSH:] As a preliminary matter, I think it may be appropriate to clarify the Commission's report to you in connection with the abandonment proceedings. That report did not mean to suggest that the Court had no obligations to impose labor protection. There was no intention of repudiating the opinion of its general counsel, Richard Allen, to Senator Kassebaum. I think it's important that that be in the record. I think that that can clearly be derived from the second sentence of the Commission's decision referring to 17(a), which says:

"However, under that Section, the duty"—I'm sorry, the sentence before that, that New York dock protection is apparently mandated by Section 17(a) of the MMRA, which was the position in fact that the general counsel took with Senator Kassebaum. Thereafter, the Commission intended to discuss the options which would [46] have been available to it, although the language it used suggested or stated that they were options available to the Court. All I can say is that that was one of those matters resulting from the press of time in which the Commission had to respond. If necessary, that can be clarified by the issuance of a supplementary order.

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[47] [MR. RUSH:] It appears to the Government that this is a classic example of a case where restraint pending judicial action is not only unnecessary, but would be improper. The criteria for such restrain [*sic*] are well known, I have cases here I can cite for the Court, but I see no reason to extend this argument by citing a lengthy number of them.

The Government's position is that the plaintiffs bear a heavier burden whereas here they seek to enjoin the operation of a statute enacted by Congress, and not simply government action, whether it be executive or an order of the I.C.C. However, the showing that they have made, we submit, falls so far short of making even the most rudimentary showing, that this Court need not decide whether the burden is in fact heavier.

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[53] THE COURT: Thank you, Mr. Rush. Mr. Broadley, you're next.

MR. BROADLEY: May it please the Court, I'm John Broadley from the Department of Justice. I must admit, I'm sorely tempted to respond to some of the particular arguments that the counsel for the creditors and the Trustee have made rather out of turn. I think I'll resist the temp-

tation and confine myself to the rather orderly argument I thought of on the plane this morning.

It's my test this morning to speak to the issue of probability of success on the merits, and clearly on the short notice we had on this hearing, we are not really in a position to definitively dispose of the wide range of constitutional issues which have been raised by the plaintiff in this proceeding. We do have a few general and a few specific observations, however, which we believe do or are sufficient to cause doubt on the constitutional deficiencies perceived by the plaintiff.

Let me address first the general observations. These, to a large extent, intertwine with the question of whether the plaintiffs are threatened with an irreparable injury. This is a question which has been addressed by Mr. Rush. It's a duty of a court, this Court, in interpreting [54] and construing a statute, if at all possible, to adopt a construction consistent with the Constitution. In this case, by filing the declaratory judgment action, the plaintiffs have raised a number of constitutional issues outside the context of a specific factual framework. They presented the Court with a spector of constitutional issues which may appear quite different when presented in a concrete form.

If it's possible to deal with these issues, constitutional issues in the context of a well developed concrete situation, we believe the Court should await that developed situation. We have serious doubts whether the issues raised by the plaintiff at this time are ripe for disposition by declaratory judgment. Let me be more specific.

At this stage, it's not clear what type of agreement or arrangement the I.C.C. is going to impose under Section 106 of the Act. While it's clear that the maximum liability of the Estate under the Act is $75 million, it's by no means certain that a liability of that size will be imposed by the I.C.C., or that the I.C.C. will not count other benefits which

have been alluded to by Mr. Murray as contributing to the labor protection which is demanded by the Rock Island Act.

The plaintiffs have raised the possibility [55] of irreparable injury flowing from the implementation of the I.C.C. prescribed arrangement and in the event that money is paid out to numerous employees and under the procedures of the Act, if the Seventh Circuit subsequently modifies or rejects the I.C.C. arrangements, whether this spector will become a concrete problem will be known only when we see the shape of the I.C.C. order. I believe one of the true bases for the argument for an injunctive relief that the plaintiffs are making is that in the hiatus, while the Court of Appeals is considering the I.C.C.'s decision, money may be paid out pursuant to the I.C.C.'s order, which, as a practical matter, could not be recovered from the numerous individual payees if the Court of Appeals should hold that the whole process is deficient, constitutionally deficient. We don't believe that it's beyond the work of the I.C.C. to take this possibility into account, and I might point out that no funds will be paid out of this Estate, or no borrowed funds, no funds will be borrowed by this Estate prior to an order by this Court directing the Trustee to pay out those funds and to borrow that money.

We've no doubt that at the time the Trustee comes in, or the Government comes in, or the labor unions come in for this implementation order after the I.C.C. decision is before us, that if the Court perceives some [56] reasonable possibility that an uncompensated taking may occur, which the Court of Appeals cannot remedy in the 60-day hiatus in which the Court of Appeals is going to consider the manner that money is going to go out as a practical matter, and if the plaintiffs win in the Court of Appeals and the whole procedure is thrown out, I don't believe it's beyond the jurisdiction, I don't believe Congress intended to deprive this Court of the opportunity of shaping an order which avoid that constitutional deficiency.

Certainly, though, the appropriate time for addressing that issue is when we see the I.C.C. order and when the matter of implementation by the Trustee is brought before the Court.

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[58] [MR. BROADLEY:] The Rock Island has operated for many, many years, since at least the early 1930's, in an environment in which labor protection or the possibility of labor protection being attached to discontinuances of operation has been a possibility and the law of the land. Until this Court's ruling on June 2nd under Section 17 of the Milwaukee Road Restructuring Act, the [59] possibility was open and apparently the I.C.C. believes that the Act mandates that New York dock conditions could have been imposed on the Rock Island. The labor protection imposed under the Rock Island Act, these are considerably smaller than the New York dock and short line protection conditions which could have been imposed by the I.C.C. under pre-existing law, and they're certainly less than were imposed by Congress itself under the Regional Rail Reorganization Act and in connection with the restructuring of the Northeast.

The argument that somehow the Rock Island Act has suddenly imposed ahead of the liens of the first mortgage bondholders new obligations, I think that completely ignores the history of operations and the environment in which labor protection has been known to be an obligation which can be imposed upon railroads.

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[61] THE COURT: Thank you, counsel. Mr. Clarke, would you like to address the Court?

MR. CLARKE: My name is John Clarke, and I represent the RLEA in this matter. Before I address some of the points that were raised by Mr. Manos and then the creditors in this proceeding, I'd just like to direct your Honor's attention to a couple of procedural matters. First of all,

the RLEA has not received, until just this morning, when I borrowed a copy from the creditors, a copy of even the motion for the T.R.O. or the preliminary injunction and, as your Honor realizes from what has [62] just been said, or said earlier today, the 47-page brief that was filed in this matter was just filed recently and we didn't even get an uncorrected copy until a couple of minutes before the hearing began. So, as far as just the procedures right now before your Honor as to whether or this is even ripe to decide constitutional questions, we submit that the parties supporting the constitutionality of this Act certainly have not even had anywhere near an adequate opportunity to address the issues that are before your Honor today. Until we saw the motion and the brief, we had an idea of what the arguments were, but not really a knowledge of what they were.

Your Honor, I'd like to direct your Honor's attention to the third request in the brief, or the motion that was filed by the Trustee in this matter, and that's for a temporary restraining order and preliminary injunction restraining and enjoining the United States Secretary of Transportation—I'm sorry, the second one, an order directing the Trustee, William M. Gibbons, not to enter into negotiations concerning any labor protection agreement under the Rock Island Act, and not to implement any labor protection agreement under the Rock Island Act.

Your Honor, as the Act shows, it specifies at 106(a) of the Act, the Trustee was required during the first ten days, the Trustee may enter into an agreement [63] with labor to implement the purpose of Section 106. The National Mediation Board, which was, by the Act, required to give its assistance to the parties, set up several meetings. The first meeting was scheduled for Tuesday, June 2nd-June 3rd. The Trustee, on May 30th, notified the Mediation Board, on May 31st notified the Mediation Board that he would not be able to attend personally and not be able to have a representative on that day and asked for an ex-

tension until this Thursday, June 5th. The meetings were put off until June 5th. They were held on the 3rd and also rescheduled to June 5th. On June 4th, the Trustee sent a telegram to the National Mediation Board saying that he was constrained not to attend the meeting, the negotiating session of June 5th. Another meeting was scheduled to be set for today, and it's my understanding has been set for 11:00 o'clock this morning in Washington, D.C. The Trustee has informed both myself, on behalf of the RLEA, and other parties, that in light of the unconstitutionality, in his opinion, of the Act, they would not participate in the negotiations.

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[68] [MR. CLARKE:] So, what we have here, your Honor, we submit, is there are two possibilities for this Act to be upheld. One is the uniform bankruptcy regulations and the second one is the Commerce clause of the Commerce power of the Congress.

Now, we'd just like to echo a few points that Mr. Broadley raised and then touch briefly on irreparable harm in this case. As Mr. Broadlay has indicated, and as we're sure this Court is well aware and the creditors are well aware, the issue, the whole concept of treatment of employees has been something that has been a familiar and integral part of railroad operations for years and years in this country. Any creditors, any investors in a railroad enterprise, invests and places his money into that venture with the clear and pure understanding that the interest of employees must be taken into account if there is an eventual
of the railroad enterprise. There have been several cases decided by the I.C.C., when it had discretionary powers to impose or not impose the protection [69] and abandonment cases, where the I.C.C. included that in an entire line of abandonment, it would not impose protections. However, they were always short lines, and any time the I.C.C. considered a large abandonment, a large reorganization, it invariably stated the fact that you could not leave that

many employees unprotected. To do so, if that was done, if those employees were left unprotected, the I.C.C. has noted, and particularly I direct your Honor's attention to the Penn Central reorganization, which is reported at 347 I.C.C. 45, and I believe around Note 21 is the particular part of that decision that bears on this, that if the Commission or if Congress left that many employees unprotected, the results upon our entire national transportation system would be devastating. The railroad worker is a unique breed, he is basically a career employee who has devoted his entire working life to railroading. It's a unique skill that is not transferable. Congress recognized that, we submit in not only this Act, the Rock Island Transition Act, but also in the Milwaukee Railroad Restructuring Act, because in its declaration of intent in Section 3 of that Act, 2 or 3 of that Act, the Congress specifically noted the fact that it's important to the national interest that trained and expert railroad workers remain in the railroad enterprise, and the railroad industry, and it [70] was partly for that reason that the Milwaukee Restructuring Act was passed. It was also for that reason, we submit, that the Rock Island Act is being passed, that it's important that these men be allowed to try to get into railroad work, to keep in railroad work.

At the present time there are 8700 Rock Island employees. It was estimated in one of the exhibits attached to the I.C.C. recomended decision and the abandoment, it was recommended that approximately 70 percent of those employees would be able to find jobs in the acquiring lines. That estimate was made February 1st or earlier of 1980. It has since been revised downward, and there are substantial numbers of employees that unless they're protected, they will be forever lost to the railroad industry. Also, those employees that have been able to find jobs are only in interim operations, which is a very nebulous type of position, and they can be without protection. So, therefore, it's important to the entire railroad system in this country

that the Rock Island employeees be treated justly and fairly, that is what the Lowden Doctrine was based upon. The Supreme Court in that case, which Mr. Broadley cited at Pages 235 and 236 of that decision, stated that when the demands of justice are ignored, the morale and efficiency of railroad workers suffers, and it's contrary to the national [71] interest to allow something like that to occur.

Now, this brings us into the argument made by counsel that in this case there is no more public interest concern in this Estate, because the Estate has been authorized to be abandoned, so therefore the creditors could care less about what happens to the rest of the country, about what happens to the continuation of the rail system. We submit, your Honor, that that's not the law of this land, and Congress has a very strong force, a very strong interest in preserving the public interest. In Ecker, in the Supreme Court Case of Ecker versus Western Pacific, the Supreme Court noted the fact that when the public interest considerations loom great in a particular matter, the solution is largely a function of the legislative and administrative agencies of the Government. That is what we have here, Congress has mandated a solution in this problem. It recognizes the public interest factor that still remains, there's still service going on, and that service is still essential to the Government, to the nation and it's important that that continue. When Congress realizes that if the employees are not treated fairly, not only would future railroad workers, the pool, the supply of future railroad workers be lost, but the present supply, the present efficiency and the present morale would be hindered. That is one [72] of the irreparable harms that can occur in this case if your Honor grants the injunctive request that is being asked for in this matter, that if this matter is held up, it will be held up hopefully for a short period of time, but it will hold up the whole process that Congress has mandated be expedited as quickly as possible, it will be delayed while a preliminary issue in resolved.

I would also direct your Honor's attention to the Congressional Report on Section 106, the discretion of Section 106, and in that report Congress specifically indicates when it was talking about the timing and everything of the speed of the decisions, that it's important that the payments be made forthwith, that the compensation, the assistance be available to the Rock Island employees as soon as possible. Therefore, one of the public interest considerations in this matter, which is the fourth test on the injunctive issue, has already been decided by Congress that it's in the public interest that this matter be continued as speedily as possible.

Now, balanced against that we have the question of the harm to the creditors, the harm to the Estate. What is the harm to the creditors in the Estate from allowing an administrative process to continue? There is no harm, except that this Court might not have as great a say in the constitutionality of the Act that [73] it would have otherwise. That's the harm that they're afraid of. The Congress has said that the Court of Appeals is the one to review any kind of administrative decision by the I.C.C. and not this Court. That is really the harm that they're afraid of. They do not want to allow your Honor to leave the realm of making a decision in this matter.

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[74] THE COURT: I don't think a response will be necessary, in light of the time, as we've gone well into the lunch hour. I have a matter at 2:00 o'clock that will take all afternoon. I indicated at the conclusion of the argument I would indicate my ruling on the application filed by the Trustee and the creditors this morning, it's my intention now to do so, if I can get the many notes I made in some form of order.

It's of no news to anybody here interested in this case that for well over four years, closer to five years, I guess, I have been trying to balance the public interest against the rights of the creditors, that I have sanctioned the con-

tinued operations of the Rock Island towards the end of an anticipated an [*sic*] hoped for reorganization. Events indicated down the line, and I accepted as inevitable, the fact that that effort had and would continue to fail, and therefore recently, in view of that conclusion, I ordered the termination of operations and the abandonment of the Rock Island operation. The Commerce Commission agreed with me, and after hearing that, I entered the final order, and we do not now have before us, for any consideration, an operating railroad.

The basic thrust and historical mission of the Commerce Commission is to oversee the operations [75] of railroads, not their liquidation, and to oversee the terms and conditions in this case of contracts entered into with other railroads to continue to operate segments of the Rock Island, if any such agreement is reached. This jurisdiction, however, is basically over the new operating entity, the Rock Island not being an operating entity.

I have before me today an application for a declaratory judgment that has to do with a statute recently enacted and an attack upon its constitutionality, and in argument there has been adverted to, and I have in front of me, the text of the preamble to that statute, the Rock Island, Section 102, and the preamble indicates the pursuit of Congress of the interest of seeking the uninterrupted continuation of services over Rock Island lines, dependent as it is, and I'm not reading, I'm paraphrasing, an adequate employee protection provision, covering Rock Island Railroad employees who are not hired by other railroads.

There is in that, and the following three paragraphs of the preamble, a basic illogic, a basic contradiction which I'm at a loss to understand. What the statute addresses itself to is labor protection for those employees who will not be absorbed by whatever [76] segments of the Rock Island are continuing to operate, and therefore the purpose of uninterrupted continuation of services over Rock Island

Lines, as part of the preamble to this statute, remains to those persons arguing it, and to me, something of a mystery. The important thing to remember is that whatever public purpose and public interest there remains in this case is the problem of the other carriers and the Interstate Commerce Commission and the on-going supervision by the I.C.C. of the operations of the other carriers over Rock Island Lines that they may have acquired. But, the Rock Island is a bankrupt corporation with no more operations, nothing left but assets and creditors and liquidation. Whatever obligations it may have to labor, it must arrive out of a contract that it had with labor, and any appropriate claims of labor under existing bankruptcy law is under the Railroad Retirement Act or any other statute which operates to fix the rights of labor. There are pension rights, I assume, there may be wage claims that can be resolved. But, these are all based upon existing law, existing rights, existing contracts, and that Congress believes that it can legislate a $75 million labor protection burden on the assets of the Rock Island comes to me as a startling concept. That the Government will lend or the FRA will lend the $75 million is irrelevant [77] in the face of the fact that obviously that becomes a claim against the Estate in derogation of the rights of the creditors in whatever assets the Estate now has.

I'm not aware that it has ever been held that Congress can single out a private industry in bankruptcy and legislate for this single company only labor-management rights. I'm aware that in the Milwaukee Act something of that nature seems to have been done. I'm not sure that I agree with Judge McMillen and his conclusions, but neither do I disagree, because his situation is so different than the one before me that I don't find it analogous. The Milwaukee continues to operate, the Milwaukee has problems the Rock Island doesn't have, and the Milwaukee is in a situation the Rock Island is not in.

It seems to me clear, without the necessity of a great deal of argument, that the Rock Island Act, which is the subject of our deliberations today, is an unconstitutional taking, an unconstitutional deprivation of the property rights of the creditors. It seems to be thus in two respects at least, and probably more, but the labor protection aspect of it, which has been argued today at some length, and in addition, the curious procedural deprivation of the ordinary rights of adjudication and appeal of decision affecting the property [78] rights of creditors in a bankruptcy case.

The labor protection scheme, however, is central to the legislation, and its infirmities are sufficient basis for the ruling that I intend to make today. But, while this is true, there are other aspects of the legislation that I have adverted to of dubious constitutionality. One I have mentioned is the strangely trunkated appellate procedure. The second, including the deprivation of the Trustee and the Court and the creditors of their control over and their rights in the Commuter Service for the extended period of two years. This and other problems remain for further consideration. However, and as I've said, the labor protection plan is the central issue of this morning's argument and this morning's determination, and it is enough to warrant the intrustion [*sic*] of the Court into this implementation of this statutory program on constitutional grounds.

I have no lack of faith in the ability of the Seventh Circuit to decide the constitutional issues here. My reservations, however, are as to the procedural anomalies which this statute embodies, setting the matter, apparently in the interest of speed and expedition, upon an exceedingly fast track, which puts a bankruptcy matter in the hands of the I.C.C., expert by definition only in terms of railroad operations, and bypasses the [79] Court which has the primary jurisdiction over bankruptcy matters. The Seventh Circuit, in any event, will review this matter one way or another,

and I would not wish it otherwise, but it will only be after an order of this Court barring the intent of this legislation to impose this significant obligation on a bankrupt estate with a statute by-passing the jurisdiction of the Bankruptcy Court in which the case is pending.

Let me comment for a moment on some of the arguments that have been made in opposition to the application of the creditors and the Trustee. Mr. Broadley and Mr. Rush have argued that it would be appropriate for the Court to let the Trustee respond to the I.C.C.'s request for information, allowing the Commerce Commission to thus formulate the issues and work out a labor protection plan which in the argument of Mr. Broadley, I think it was, might be acceptable to the Court and the Trustee. I know that was Mr. Rush's argument. It might even be much less than the $75 million, it might be $50 million or $25 million. The issues is [*sic*] not whether the I.C.C. can arrive at a labor protection plan which the creditors and the Trustee could live with, even if that plan were to cost the Estate only $1 million. The issue is whether ab initio, the concept of a compelled labor protection plan, paid for out of the Estate, [80] whatever the plan, has any constitutional sanction. We don't have to wait for an I.C.C. determination of the details of the plan to determine that issue.

Mr. Broadley has argued the Lowden case, the Old Rock Island case, a reorganized railroad continuing operations, and that, of course, that phrase, "Continuing operations," is the reason why the Lowden case is not applicable here. In its continuing operations after its earlier reorganization, those continuing operations invoked the continuing jurisdiction of the Commerce Commission. The uniqueness of the situation here is that the Rock Island is not a railroad corporation any longer, it's not an operating railroad, it's a corporation in the business of liquidating real estate and equipment and paying off creditors. The environment of labor protection decisions and precedent and all of the

Court's decisions and precedent flowing therefrom has always been the environment of an operating railroad, and that is singularly the environment we no longer have here.

Mr. Clarke argues that there is no more public interest, or there is no more public interest here because, at least within the discretion of the Court, because the legislature, the ultimate repository of decisions on public interest, has spoken and decided what the public interest is. If Congress sees public [81] interest, of course, Congress may serve that public interest by appropriate legislation which does so with public funds. One of the central issues in this case is and always has been and will be and will continue to be to what extent the private sector, here the creditors and the bondholders, can be saddled with the public interest. Congress may determine public interest, but Congress may not take private property to serve the public interest.

I find that we have an emergency here, there is irreparable harm to the Rock Island and the creditors if this procedure mandated by the Rock Island Act goes forward, that the probability of determination of unconstitutionality of this Act after more mature consideration and deliberations is exceedingly great, and that all the statutory and traditional requirements for emergency relief have been met. The emergency relief sought in the petition before me in Paragraph 1 is a temporary restraining order and a preliminary injunction restraining the Commission from asserting jurisdiction to consider or impose labor protection arrangements as provided by the Rock Island Act; an order on the Trustee not to enter into these negotiations as provided by the Act and requested by the Commerce Commission; and a preliminary injunction restraining the United States [82] Secretary of Transportation from going ahead with the statutorily authorized $75 million loan and consequent obligations on the Rock Island that would flow out of the making of that loan.

Because of the apparent unconstitutionality of this Act, I think this relief is warranted, and its effectuation and implementation must be enjoined, and therefore I will enter an order granting the prayers for relief that I have just summarized in the petition of the Rock Island Railroad, Trustee and the creditors. This is a preliminary injunction, I see no need for a temporary restraining order. I think in the issue of constitutionality of an Act, which we can all read and argue, a temporary restraining order is not necessary and a preliminary injunction is the order I intend to enter. This, among other things, opens the avenue of appealability, which I think is probably desirable in this case.

I will continue the matter for further argument and further report on the preliminary injunction and for a determination of whether, after I hear whatever additional you have to present, it should be transmuted into a permanent injunction, a final injunctive order and will grant some time for that. I would expect, however, that before that time there will be a movement in the [83] direction of the Court of Appeals, which is why I have made it a preliminary injunction and an appealable order.

I think the way to finalize this is to draw an order which merely contains the prayers for relief in the plaintiff's motion for a preliminary injunction, which I have indicated I'm ready to grant, so I will merely dictate an order which will be available to you gentlemen before the end of the day embodying those three requests for relief and putting them in order form rather than in prayer form.

Is there anything further, gentlemen, that remains to be done?

MR. CLARKE: Your Honor, there's one matter, and that's a question of whether or not in light of the fact that there is no money needed from the Estate for the next 20 days at least, that your Honor will stay your order at this time

to allow the Interstate Commerce Commission to consider the issue under Section 106(b) of the Act.

THE COURT: Well, actually that's been the thrust of the argument, Mr. Clarke, and Mr. Broadley, Mr. Rush having argued that no harm will be done by the implementation of this Act, and I have not agreed with that, I don't share their views on the subject. I think that the Act is designed, despite argument to the contrary, to take jurisdiction over this matter away from the Bankruptcy [84] Court, that the Commission is to make its determinations appealable only to the Courts of Appeals, that I have no role in that and I think that's one of the unconstitutional aspects of the statute. It has been argued that when all of this has been done, the Trustee will have to come to me for an order approving whatever it is that the Commerce Commission has told him to do. I do not so read the Act, I don't think that's what it says, and therefore to grant your request would merely be to allow to go forward what I have just enjoined, and therefore I deny that motion.

Mr. Broadley, what——

MR. BROADLEY: I was just going to join him in a motion for a stay.

THE COURT: I'll deny the motion for a stay. Gentlemen, I'll get an order out as quickly as I can so all of you have something to go to the Court of Appeals with.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 B 2697

In the Matter of

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,
Debtor,

WILLIAM M. GIBBONS, as Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; and HENRY CROWN, ET AL.,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, *Defendants.*

PRELIMINARY INJUNCTION

This matter is before the court on the joint motion of the trustee and creditors of the estate of the Chicago, Rock Island and Pacific Railroad Company. The trustee and creditors have filed a complaint for a declaratory judgment and injunctive relief declaring the Rock Island Railroad Transition and Employee Assistance Act ("the Rock Island Act") (a copy of which is found in H.R. Rep. No. 96-1041, —— Cong. Rec.-House, H3875 (May 20, 1980)) unconstitutional and enjoining its enforcement. The court has reviewed the complaint and motion and their supporting documents and memoranda. In addition, the court has heard arguments of all interested parties.

Pursuant to the requests for relief in the written filings and the arguments of counsel, the court made oral findings

from the bench at the conclusion of the arguments heard this day. Those findings need not be restated here. However, pursuant thereto, the court orders the issuance of a preliminary injunction:

1) preliminarily enjoining the Interstate Commerce Commission from asserting jurisdiction to consider or to impose any labor protection arrangement or obligation under the Rock Island Act; and

2) preliminarily enjoining the Trustee, William M. Gibbons, from entering into negotiations respecting any labor protection agreement and from implementing any such labor protection agreement under the Rock Island Act; and

3) preliminarily enjoining the United States Secretary of Transportation from requesting, approving or guaranteeing any loan or obligation on the estate of the Chicago, Rock Island and Pacific Railroad Company under the provisions of the Rock Island Act.

ENTER:

FRANK MCGARR
United States District Judge

Dated: June 9, 1980

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 B 2697

In the Matter of:

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,
Debtor.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled matter before the HONORABLE FRANK J. MC GARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, the 20th day of June, 1980, at the hour of 10:00 o'clock a.m.

[3] THE CLERK: 75 B 2697, in the Matter of the Chicago, Rock Island & Pacific Railroad Company, Debtor, et al., versus the United States of America, et al. Defendant's motion to vacate preliminary injunction entered on June 9, 1980.

THE COURT: I turn my back on you fellows for one week and I get a thousand pages of briefs.

I'm ready to hear you, counsel.

MR. BROADLEY: Your Honor, I suppose the first thing I should do—for the record, I'm John Broadly [*sic*], from the Department of Justice, appearing here for the defendant United States and Neil Goldschmidt.

I suppose the first thing I ought to do is to explain why we're here on a motion to vacate on the preliminary injunction your Honor entered less than two weeks ago. The original motion was heard on the 9th and was noticed as a TRO motion, and we had a very short period of time to prepare for that matter. We filed no written arguments. Once your Honor entered the preliminary injunction, we

did some research on the question of appeal, and, lo and behold, it turns out that we would have to go to the Supreme Court rather than to the Seventh Circuit and we thought that if at all possible we should first attempt to prepare and file a memorandum in this Court, attempt to change your Honor's mind with [4] our arguments presented a little more fully than was possible at the hearing on the 9th, and to avoid bothering the Supreme Court, and also, frankly, to avoid the jurisdictional problems which could well result if this order is appealed to the Supreme Court. I believe Mr. Rush will address that in some greater length later.

At this time, I think I'll reverse the traditional route in a preliminary injunction, temporary injunction proceeding, and talk first about the plaintiffs' probability of success on the merits, and I'll try not to be too lengthy, because all of our arguments are set forth in the memorandum we filed.

THE COURT: I can assure you I've read it too, counsel.

MR. BROADLEY: While we're on that subject, your Honor, there are two errors, the memo was prepared, as you can imagine, in great haste. On page 8 the Supreme Court citation to the Bannercraft Clothing Case was ommitted [*sic*], and it's 415 U.S. 1, 1973.

THE COURT: All right, counsel.

MR. BROADLEY: And on page 12, the penultimate sentence, there's an obvious typographical error, the word, "enjoined" is written as "enjoyed."

THE COURT: All right.

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[7] [MR. BROADLEY:] With respect to the taking issue, I must confess, we did not go into this issue in our brief in the greatest depth, first, for the obvious reason there wasn't a great deal of time when we were preparing it, and sec-

ondly, because we think Congress quite clearly has committed this issue to the Seventh Circuit. But, the Plaintiffs here make the argument that Congress and the Rock Island Act has come in and imposed upon them a new obligation. Well, in 1920, the Transportation Act commended the Interstate Commerce Act to authorize the Commission to impose conditions on abandonments, and since the late 1930's the Commission did exercise the authority that Congress had granted it twenty years earlier to impose labor protection conditions [8] on abandonments and the exercise of this authority was sustained by the Supreme Court in Interstate Commerce Commission versus Railway Labor Executives [*sic*] Association.

The heart of the creditors' argument, it seems to me, is that somehow they have a property right or a protectable interest in the exercise of the discretion of the I.C.C., which was exercised in a number of small systemwide abandonments to impose new labor protection. It seems to us that the abandonment of the Tennessee Central, which I believe is a two-hundred mile railroad, and the abandonment of the eight-thousand odd miles of the Rock Island are not only quantitatively different, but qualitatively different. In the Lowden and I.C.C. versus R.L.E.A. case, the Supreme Court recognized the national interest, the Congressional interest in peaceful labor relations on the railroad and found that the Commission's exercise of its power under Section 120 of the Interstate Commerce Act to impose labor protection conditions was a rational Congressional legislation addressing something within Congress' power to regulate under the Commerce Clause.

The investors in railroads, since 1920, have known that in any abandonment, the possibility was there that using the discretion of the I.C.C., or later the discretion of the Court under the MRRA, or some other [9] specific legislation, that their investment in the railroad was going to be subject to the potential claim, or potential provision for

labor, for employees, exercised in the national interest, and that the Congress had the power and had exercised the power to insure that in cases of abandonment that the national interest and peaceful labor relations was not going to be ignored. So, contrary to their contentions, this is not a new obligation, this is a new quantification, and in fact it is a quantification that is perhaps much smaller than may be required, than may have been required under pre-existing law. Certainly it's a quantification that is much smaller than the labor protection obligations which would result if the New York Dock conditions were applied, and I believe Mr. Clarke here is in the Court of Appeals contending that they should be applied. But, we offer no views on the applicability of whether under the pre-existing law New York Dock was mandatory.

We get now to the second factor of granting a preliminary injunction, the public interest. Here our argument is quite simple. Congress thought that quick action was necessary. Congress thought that labor protection was necessary to facilitate the rapid, smooth sale of the essential lines of the Rock Island to other carriers, and we believe that when Congress has found that [10] when expedition is in the public interest, the Court should take into account and afford this factor substantial weight in determining whether to grant the preliminary injunction.

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[12] THE COURT: Thank you, Mr. Broadley. Mr. Rush.

MR. RUSH: For the record, Henri Rush representing the Interstate Commerce Commission. I have a very few brief remarks, most of which echo Mr. Broadley's.

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[14] [MR. RUSH:] So, basically, in summary, the problems we have are a frustration of the intent of Congress by [15] enjoining the preliminary aspects of the operation of the mechanism they created for resolving the labor protection issue, and, as is pointed out in my memorandum, and

I will not reiterate, the imposition of an unnecessary burden on the United States Supreme Court in the present posture of the case with the possibility of a jurisdictional legal Procedural nightmare being created as a result of review going on at the same time, both in the Supreme Court and the Seventh Circuit.

I'd simply like to say that my agency stands ready, willing and able to undertake the functions which were assigned to it under the Act by Congress. If your Honor were to vacate the preliminary injunction, we would be prepared to issue a new scheduling notice of the sort which I read portions of into the record at the last hearing, this coming Monday. The information wouldn't change, the date, obviously, would have to.

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MR. CLARKE: May it please the Court, my name is John Clarke, and I represent the RLEA, intervenor in this proceeding.

[16] Your Honor, we have filed, shortly before this hearing today, a memorandum and several factual exhibits which were attached to it as appendicies [*sic*], which we ask the Court to receive into evidence basically under Federal Rule of Evidence 803.8, namely official records, except for the affidavit, which even though it purports to contain matters from the F.R.A. files is in the form of an affidavit and therefore admissible in that sense.

THE COURT: I'll receive your filing with the attachments.

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[17] [MR. CLARKE:] We have shown, by the evidence submitted, [18] along with the exhibits in this case, that out of the 8700 Rock Island employees who were in the employ of the Rock Island in August of 1979, no more than slightly over two-thousand of those employees are presently working on the lines. What has happened to the remaining six-thousand employees? It's hard to say. Two-thousand seven-

hundred is what we're talking about, 2,641 to be exact. Two-hundred and forty-one are in the employ of the interim operators; three-hundred are in the employ of the KCT in its wind down operations, which are winding down rapidly, so they'll most likely be unemployed soon; and three-hundred in the employ of the Trustee himself. So, out of 8700 employees, approximately six-thousand of those employees have lost their positions, their lives, and it's those six thousand employees, we submit, that Congress was interested in when it enacted the Rock Island Transition Act, and it was for those six-thousand employees that Congress intended to perform some form of monetary assistance, one, to keep them in the railroad business itself, to keep their careers there, to keep their valuable—to keep that valuable body of people available to our nation's transportation service, and the secondly, to prevent the type of disruptions that unequal treatment of employees can create over the entire railroad system, especially in the economies of the states [19] that we're dealing with the thirteen states that the Rock Island engages in, and also the economies of the states of all those railroads that are now doing interim operations which will be effected if this thing blows up, as it's possible it could.

We have shown—or the Trustee, first of all, has argued that, well, there's a lot of protection for these people, there's $25.00 a day under Railroad Unemployment. We have given some statistics on basically how Railroad Unemployment works. Granted, for some people it can last for up to two years, a period of 26 weeks, 130 days at a time, 130 benefit days at a time. But we're talking about $25.00 a day, $250.00 every two weeks, which in a year is around $6,000 and some odd dollars, which is below the poverty level for a family of four in this country.

No one, we submit, who is making $15,000 to $20,000 per year prior to this episode can be expected to long survive on that amount of money for that period of time. We are

coming close to the end of the line, and we submit that it's important that this Congressional Act be implemented now the way Congress said it would.

Now, I direct the Court's attention to, as Mr. Broadley has indicated, to the Congressional [20] doctrine, which is quite clear, namely that the statute should be construed in a manner to make it constitutional if at all possible. There is also another doctrine that fits along with that, and that is that if you don't have to reach the constitutional issue to decide the matter, you should not at that point. And finally there's another doctrine that follows along from those two, and that has been stated several times by Mr. Justice Rhenquist [*sic*] in his in chambers opinions dealing with stays, statutes are presumptively constitutional, and absent some compelling equities on the other side, should remain in effect pending a final decision on the merits by the Court.

Now, those are the principles that apply to this case. So, the first question that really comes down, even besides the merits of the constitutional arguments, is that harm would occur to the Plaintiffs in this adversary proceeding if the statute is allowed to go foreward.

First of all, there's the possibility of an unconstitutional taking. Well, there's Appendix 'J', which is attached hereto, and also the statute will show it's basically impossible that this plan can be implemented in the time it will take for the Court of Appeals to decide the constitutional issues. There's a sixty day expedited appeal process in the Court of Appeals. In the Milwaukee [21] situation, the Milwaukee applied for a very similar loan, $75 million, under a federal guaranty and statutes that are almost word for word the same. They filed it on January 11th and on March 7th it was finally guaranteed and approved and the money was available for drawn down sometime in April—April 21st, to be exact. Actually it could have been probably drawn down shortly after the March 7th guaranty. But, you're

talking about a period of fifty-six days from the date of application.

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[23] The identical language used in 110(e) in this Act was used in 15(e) in the Milwaukee Railroad Restructuring Act. That is the language that can possibly be used to argue that The Tucker Act has been removed. Maybe it could be that the Tucker Act was removed in the Milwaukee case, but surely Congress knows that when Judge McMillen, on February 7th, said the Tucker Act is there and they used that same identical language, it's almost impossible to argue that the Tucker Act is now not available because Congress has to deprive the Court, or deprive the creditors of that remedy by a specific act, it is not done by implication.

The Tucker Act, we submit, is here, even if there was an unconstitutional taking, which, as we've argued in our brief which we submitted to this Court that there is no unconstitutional taking in this matter.

So, the claim about irreparable harm because of a taking just doesn't lie in this case, it's not here, and the matter of today, tomorrow or two weeks from now, or five or six months from now, it's just not present.

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[27] What we are down to, we submit, your Honor, is that the public interest, as in the Ecker case, bulks large in this case, and because of that, Congress has the perfect right to say how that public interest should be implemented and carried forth, and Congress has the perfect right to refer that implementation to the Interstate Commerce Commission. It has been upheld before in the Ecker case, in the Continental Bank case where the whole question of the constitutionality of the Bankruptcy Act was involved, and we submit it can clearly be upheld under the Commerce Clause of the Constitution. Whether or not this is or is not a uniform bankruptcy act, well, that doesn't matter, as long as Congress has the power under the Commerce

Clause, even if it violates the uniformity clause of the Bankruptcy Act, it's still valid, we submit.

But again, we come down to the final question. Where is the irreparable harm? If the I.C.C. did not have the authority to do it, the Court of Appeals can tell them they didn't have the authority to do it. If it's unconstitutional, surely the Court of Appeals, as well as this Court, would have the ability to find that out, and then during that time period, if there was any money paid out that was in error, the Tucker Act is there to help the creditors and the Estate make themselves whole.

We submit, your Honor, that as a result [28] of what has happened in the last two weeks, we have lost two weeks in the implementation of a plan, of an Act which Congress has said in its conference reports and its House Reports and in the Act itself, it is essential that this be implemented forthwith and not held up over litigation. There are remedies to help people if litigation does ensue, but in the meantime, protect that public interest.

This Court, we submit, is still the Section 77 Reorganization Court, it still has the role to, under 77, recognize the public interest. Congress has defined what that public interest is, and we submit this Court has a clear duty to allow that public interest to be implemented at this time and if there is an argument, then the statute provides procedures with which to correct it.

For that reason, your Honor, we submit and ask that the—we join the Government's motion that the preliminary injunction be vacated forthwith and that there be no further delay in this matter.

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[39] THE COURT: Does anyone representing the creditor's group wish to comment? Mr. Murray.

MR. MURRAY: Your Honor, I don't wish to burden the Court with extensive argument today, because I know

that your Honor has already heard the argument of the Trustee and the argument of the creditors at the last hearing held on this motion.

Your Honor, as I understand the crux of the Government's argument, they appear to contend that we have all misread the Act. The Act says, for example, that the labor protection obligation that's imposed on the Rock Island Estate will have administrative expense status, but the Government tells us, at page 8 of their brief, that the cost of the labor protection arrangement imposed by the I.C.C. would have administrative expense status if such status in such amounts are sustained by the Court of Appeals as a valid obligation on the Estate within Congressional power to impose. The implication is that indeed, the Court might rule contrary to the language of the statute that there is no administrative expense status.

The Act tells us that there can be no stay of the I.C.C.'s order imposing a labor protection arrangement and that the Reorganization Court must implement that arrangement forthwith. But again, the Government tells us, at page 9 of its brief, and as repeated in argument today [40] to your Honor, while the Court is precluded from staying the order of the Commission, and other Courts are precluded from staying the order of this Court directing the implementation of the I.C.C.'s arrangement, there is nothing in the statute which would require the Court to direct the Trustee to take any action which could lead to a taking of the property of the Estate. Again, the Act, by its own terms, precludes Supreme Court review, but the Government tells us, at page 25 of its brief, even if a substantial question were presented by the limitation on Supreme Court review, that question could be presented to the Supreme Court by a party taking an appeal of filing a petition for certiorari. And again, the Act precludes any liability on the part of the United States. In fact, the language is very specific.

The RLEA, at page 21 of their brief, argues that any payments in the interim from the corpus of the Estate, or course, would be recoverable under the Tucker Act if it is subsequently determined that the arrangement was unlawful.

Your Honor, Mr. Rush has adverted to what he calls Hornbook law, and we agree with this statement of the law, that the Court should attempt, wherever possible, to find an interpretation of an Act that is constitutional. But, your Honor, I must advert to other law on this case, and this is ennunciated by the Chief Justice in the case of T.V.A. versus Hill, and I think it's equally applicable. In that case the [41] dissenters argued that a certain interpretation of the statute that was far beyond any plain meaning of the statute, and the Chief Justice Burger stated that the Court would, "be forced to ignore the ordinary meaning of plan [*sic*] language" if it were to adopt the dissenters' position. And Mr. Chief Justice Burger explains further in language that I believe is equally applicable to the Government's interpretation here, and I quote, "Aside from the bare assertion, however, no explanation is offered to support the proffered interpretation. This recalls Lewis Carroll's classic advice on the construction of language," and Mr. Chief Justice Burger quotes, "When I use a word, Humpty Dumpty said in rather a scornful tone, it means just what I choose it to mean, neither more nor less," quoting from "Through the Looking Glass and the Complete Works of Lewis Carroll.["]

Your Honor, without in any analagizing [*sic*] Mr. Rush or Mr. Broadley or Mr. Clarke with Humpty Dumpty, I want to say that I think the problem they face is that they would like to rewrite the statute, because it is not defensible in the form in which it presently appears. Our position is that irreparable injury would occur if the I.C.C. exercised its jurisdiction to impose any labor protection debt on the Estate, because no debt can constitutionally be imposed,

and I believe that your Honor specifically adverted to that point in your opinion rendered orally.

[42] It's absurd to argue that no harm would or could result in the Rock Island Trustee's participation in I.C.C. proceedings. Mr. Clarke has specifically stated that the Act contemplates a two tiered approach. On one tier, implementation of the Act proceeds, and then on the other tier, an appeal proceeds. So, the fact of the matter is that implementation proceeds simultaneously and there is no assurance that monies would not be paid out.

The fact of the matter is, though, that during the period of the appeal of the Act, the Trustee would be under conflicting obligations, and we believe very firmly that this Court, sitting as a reorganization Court and a Court of equity under Section 77 of the Bankruptcy Act, has clear jurisdiction to issue an injunction in aid of the purposes of Section 77, and to instruct its Trustee as to what must be done.

The Government talks about there being a new debt, but this is not a new debt. The Government talks about quantifying an existing debt, but that is contrary to the facts and the law, as this Court has clearly held. This Court has held that on a constitutional basis, that no labor protection debt could be imposed under existing law.

We are not adverting, therefore, to any decisions by the I.C.C. that decide in the exercise of its discretion whether or not to impose labor protection. [43] This Court has held that the Rock Island has a right to abandonment, a constitutional right to abandonment without any preconditions, including any precondition of labor protection.

Your Honor, the Government has adverted to a line of cases concerning participation in agency proceedings which will be subsequently subject to timely judicial review. This is not such a case. This Act does not permit this Court to exercise its discretion in ordering implementation of an

I.C.C. order. It's required that the Court shall order implementation. It would thus be a ministerial act which might subject this Court to mandamus proceedings for refusing to implement the Act. Furthermore, once the debt has been imposed and the Government is right, Congress has destroyed Supreme Court review of a constitutional issue, then as soon as the I.C.C. exercises its jurisdiction, the Estate has lost its right to Supreme Court review, which it now has, and that lost right clearly constitutes irreparable injury.

Your Honor, with respect to the question of public policy, this Court has already decided that no labor protection obligation constitutionally may be imposed upon this Estate. The way for the Government to prevent any irreparable harm or injury to public policy through anticipated labor strife is to pay for labor protection itself. The Government has an interest in ongoing rail operations, and the public as an [44] an [*sic*] interest in ongoing rail operations, but the Rock Island itself is no longer a common carrier, it does not share that interest. Therefore, it would be an unconstitutional taking for the United States to impose on this Estate a charge to serve a public purpose.

We are very much in sympathy with those hard working employees of the Rock Island for many years who have lost their jobs, and it's a very sad event, and it's very sad to see that they no longer have any means of support, or very modest means of support. But, we are beyond the point where the Estate can be of any assistance to them. We were of assistance to them for five years in these reorganization proceedings, and at this point if they are to be helped in any way, it must be with the assistance of the Federal Government not with the assistance of private creditors.

We would strongly urge the Government to have concern for these employees and to provide them with some sort

of assistance, but again, it cannot come at the expense of the private creditors of the Rock Island.

Your Honor, for all of these reasons and for the reasons stated in the prior hearing, we would urge that your Honor not vacate your order entered on June 9, 1980.

Thank you, your Honor.

THE COURT: Mr. Moritz.

[45] MR. MORITZ: Your Honor, I think in the presentations and the briefs that the Court has heard, by representatives of the Government and the RLEA, we really have reached a high water mark of half truths and misleading arguments in this proceeding.

Turning first, and really only by example, because the volume of papers filed in the last two days really would require far too long and an unreasonable amount of time to refute the assertions that are made, but turning first to a statement made in argument by counsel for the RLEA, counsel's argument is that there's no reason for the Court to Act [*sic*] now because opportunity for the Court to act at some time in the future will be available, and counsel suggests that the procedural anomalies that the Court acting at this point creates such problems that they will create difficulties on review. Yet, at the same time counsel argues that in twenty days, when the Court is required to direct the Trustee to implement a labor protection arrangement imposed by the I.C.C., the Court will be empowered to act at that point.

I'd submit that the procedural anomolies [*sic*] that exist today, if indeed they exist at all, will exist in twenty days, and what counsel for the RLEA is simply trying to do is buy time to postpone the Court's recognition that this is an unconstitutional taking in the hope that once the procedure starts, no one will be able to retrieve it.

[46] Now, counsel for the RLEA also argues that it will take a long time to get this labor protection money out to these various employees. Well, I don't believe that's true. I think Mr. Manos did hit the nail on the head when he suggested that the Interstate Commerce Commission is prepared to move with incredible dispatch, and one must recognize that once a loan obligation is incurred by the Trustee, it has something called cost of administration status. We don't know as we stand here today what that means. We know at a minimum that some creditors are displaced, and so we face the prospect that on a very short time, something called cost of administration status in the amount of $75 million will be imposed on the Rock Island to achieve a public purpose. That, we submit, represents an irreparable harm.

Now, Mr. Clarke suggests that enough time will pass and the Seventh Circuit can decide that issue, or whatever issues he thinks are appropriate before the Seventh Circuit, and that those issues can be decided before payments are made. But, on page 4 of Mr. Clarke's brief submitted this afternoon, he quotes from the legislative history of this Act, and that legislative history says, and I'm quoting from Mr. Clarke's brief, "So that payments to Rock Island employees will be made forthwith, notwithstanding any ensuing litigation concerning such payments."

[47] Your Honor, the contradiction is apparent. On the one hand, counsel appears before the Court saying we have time. In his brief, he's saying the legislative history is such that immediate payment to these employees must be made.

I submit that if the Court lifts its restraining order, we are going to have Mr. Clarke and the I.C.C. before this Court attempting to impose the borrowing obligations long before the Seventh Circuit has a chance to rule, and that distribution of monies to these six-thousand employees will be made long before the Seventh Circuit has an opportunity to rule and that the creditors of the Estate will be put in a position of trying to argue the cost of administration

status doesn't mean that the Government has to be repaid out of the first dollars that are generated by the disposition of property in this Estate, and that that anomaly, that inconsistency in the statute, that inability to perceive where the statute will lead us represents irreparable harm, sufficient irreparable harm to justify this Court acting now.

If one reads Mr. Broadley's brief, one sees that even the Government doesn't understand exactly what this Act means. The brief is replete with representations that we aren't really certain what kind of labor protection should be imposed. It's replete with those kinds of assertions, your Honor, and I submit that the fact that those kinds of [48] ambiguities exist justify the Court's order of June 9th and justifies the Court's rejection of the contention that the preliminary injunction should be set aside.

Mr. Broadley says in his brief that there is a quantification of labor protection imposed by the Rock Island Employee Transition Act. But, your Honor, one can look through that Act in vain for any statement that says this is a maximum cap on labor protection obligations. There's nothing in the Act that suggests that this is an absolute quantification. It is a quantification of employee assistance under the Act, it does not forever limit Rock Island's obligations, and if this Court is reversed in its earlier ruling with respect to the imposition of labor protection under 11.346 and 10.943, I believe, there is still an opportunity for additional labor protection under the terms both of the Rock Island Employee Transition Act and under traditional labor protection.

So, the Government is misleading the Court in suggesting that this represents an absolute quantification. It does not. The Act has no representation to that effect.

Lastly, your Honor, we heard from Mr. Rush that the Government is frustrated in its intentions. Your Honor, the cases are legion that the Government acts under the terms of the Commerce Clause. The Commerce Clause and

the power of Congress is subservient to the rights of [49] individuals under the Fifth Amendment. That's where the cases are legion, your Honor. When the rights of the individuals, as protected by the Constitution, are impacted or interdicted by the acts of Government, then Congress is appropriately frustrated, because Congress has breached the Constitution, and when that occurs, then it's appropriate for a Court to act. That's the way the system is supposed to function. That's the way the system functioned in this case, and I submit that we have heard nothing today to justify the Court reversing its earlier order.

THE COURT: The circumstances of this case, in its leaping from crisis to crisis, which seems to be its history, has frequently compelled the litigants to come in, as they did earlier this week, and also as they did last week and today, in order to address emergencies where there is very little time involved, and that has necessarily compelled me to respond in kind, so that I'm constantly issuing opinions orally from the bench after listening to arguments of counsel and after a brief chance, usually overnight, to read some of the very excellent briefs that I've been supplied with.

It occurs to me that I should be embarrassed that every record that goes to the Court of Appeals, instead of presenting what I would hope to be my reasoned and literate opinion, is going up sort of off the cuff on findings and conclusions that the circumstances mandate. But, I guess [50] that's the way it has to be.

In order to illuminate, as best I can, the reasons for the ruling which I intend to announce on this motion, I'd like to make some general comments both on the background of the issue and the issues themselves as they're raised.

I did this the last time, I don't know how well it turned out, but, as I said, the exigencies of time are such that it seems to be the best way to do it.

I've heard a lot of reference today, and always in this case, to the public interest, and Mr. Clarke now argues that it was in the public interest to avoid the harsh consequences upon those terminated employees of the Rock Island which he sees implicit in my order. And it's the argument of the Government that the public interest, which lies generally in the capable hands of the Commerce Commission, is where the public interest should remain and that they should obey the mandate of Congress and implement the plan which Congress so obviously in the public interest wants them to do.

The creditors have listened to the public interest argument for five years and I imagine they grew fairly tired of it fairly early in the game, because, as always, I have tried in this case to balance the public interest against the private rights OF [*sic*] the creditors, and one must do that in a [51] case involving a public utility such as a railroad, and which one never does in any other type of a bankruptcy case because it's so extraordinary that it can be argued that the private right of contract can be effected by the public interest to the extent that it has been in this case.

But, the public interest has many aspects. There was always, in the long life of this case, a strong public interest in the continued operation of the Railroad. We came to a time in the case when even the Commerce Commission abandoned that, as did I.

There has always been an employees' interest. No court ever takes lightly the signing of an order, the issuance of an order that threatens unemployment of a very large number of people, so the employees' interest has been determinative and paramont [*sic*], and that combination of the public interest and the employees' interest gave the Rock Island five years of operation and the employees five years of employment, which had a different view been taken of the public interest vis a vis the creditors' interest, they might not have had.

As to the creditors' interest, which is contrary to the public interest in this case, we have reached that stage in the administration of the Rock Island where since it's no longer an operating Railroad, it's the creditors' interests that are now paramont [*sic*] and must be served.

[52] I'd like to characterize those creditors for a moment. We are tempted to think of the creditors in this case, because they have been active in the case as banks and bondholdres [*sic*] and so forth, but my desk is piled high with letters that I have been receiving for many, many months from small businesses and small taking authorities and school districts and from all through the Middle West and the area that the Rock Island serves, telling tales of extreme hardship that have been occasioned by the failure and inability of the Rock Island to pay its bills. These are not giants, they're not banks. They're people upon whom the hardships of the abandonment of the service of the Rock Island and its bankruptcy falls every bit as harshly as the same problems fall on the employees.

What I'm really trying to say, I suppose, is that everyone in this case, as is natural and as is human, approaches it from a single point of view, and I am charged with and have tried hard to see every issue in this case in the light of all of these interests and points of view which I have just discussed.

The statute that we're dealing with today, the Rock Island Transition Act, to give it a shorthand name, exudes concern for expedition, and it is in that atmosphere that this entire proceeding concerning it has taken place. We have moved rapidly, we have tried to do things rapidly and [53] set up possibilities of appeal rapidly for the reason that the issues are vital and important and all these interests are involved and rapid determination of what must be determined seemed to be in order.

In the order that is the subject of today's petition, I did not, in so many words, adjudicate the unconstitutionality

of the Rock Island Transition Act, although my remarks indicated that I certainly believed that it was probably that that would be the ultimate conclusion of the Court were we to go down the route to the final injunctive order. But, I did enter a preliminary injunction prohibiting its implementation on the grounds that we had a genuine emergency, that we had irreparable injury and that we had a reasonable probability of the plaintiffs' success on the arguments as to the unconstitutionality of the Act, in both its substance and in the procedures which it set up.

The unconstitutional aspect of the taking of private property to fund a legislatively created special benefits program for the terminated employees remains, in my mind, after all the argument that I have heard today, still the most single valid constitutional argument addressed to the Rock Island Transition Act. The Rock Island as an operating railroad was suffused with the public interest. But, the Rock Island as a non operating former railroad has lost that [54] character, and therefore, Congress their approach to it, to the public interest seems to me to misapprehend the [fact] that what they are dealing with is a private business with a lot of creditors which own some property and which is being liquidated for the benefit of creditors, and that it is not an operating railroad and that the public interest is no longer paramont [*sic*] and that the employees of the railroad, regrettable as it is, are former employees of the Railroad.

Among the rationals [*sic*] that have been developed to justify Government intervention into railroading over the years has been the public interest and peaceful labor relations, and the public interest in the necessity to keep an operating railroad operating. The operating railroad aspect is now gone as a factual basis for the interest of Congress, and if Congress had a sufficiently legitimate public interest in peaceful labor relations, as it asserts, and as it has been argued, as a foundation for what it has done, nothing

justifies Congress satisfying the public interest in peaceful labor relations by the taking of private property. The public interest, if it is a real public interest, must be served by public funds.

Mr. Clarke has argued that the money should be paid, the money provided by Congress and by this Act to come from this Estate, that it should be paid to the employees while the legal process goes forward [*sic*] and he argues that with [55] some considerable persuasion. But in truth, the argument that the funds, if improperly paid, are recoverable under the Tucker Act is a specious argument and if the money is paid to the employees while the legal processes go foreward [*sic*] and if the constitutionality of the Act, or my decision on it, was correct, there is no doubt that there has been irreparable harm to the Estate of the Rock Island.

Neither is it certain in my mind that as a matter of law that I have the final and total control over the disbursement of the funds, as the Government argues, and therefore, I cannot accept that argument as a reliable predicate for the Court's conclusion that there is no irreparable harm possible in this case, because ultimately I will have the last say as to the disbursement of the funds.

With everybody concerned with expedition and everybody arguing for speed, it seems to me that it doesn't matter very much whether the constitutionality of this Act, which is the basic issue we're all concerned with, is adjudicated in the context of an appeal from my order of a week or so ago, or, as Mr. Rush would have it, after the I.C.C. implements the order and the Rock Island comes to me for an authorization to disburse the funds, which I might be expected to deny if I had the same opinion on constitutionality then as I do now. Or, as Mr. Clarke argues, that after the I.C. [*sic*] implements the program and gets set to disburse the funds, that [56] if we handle the appeal expeditiously enough, we may get an order out of the Ap-

pellate Court before we get the money out of the Rock Island.

All of those programs and all of those paths lead to the same conclusion, and that is the absolute necessity in the present posture of this case for an appellate determination of the validity of my tentative preliminary conclusion that the Act we are discussing is unconstitutional, and in a pragmatic way, it seems obvious to me that the best way to handle that is in an appeal from the order which I have already entered. The fastest way to resolve it is also in that appeal, and I suppose that's why it's the best way.

It is argued, and the Government is understandably concerned that there is confusion as to where that appeal should go, do we have a Seventh Circuit matter, or do we have a Supreme Court matter. I must confess that the issue is confusing to me and I'm not certain, although I'm sure that you gentlemen have given it much more study and thought than I have.

This is a problem created, however, by the Act itself, as I view it, in its attempt to tamper with the ordinary appellate process, and I say that Congress having created this problem, it leaves me no avenue to resolve it.

In summary, I think since Congress desired expedition here, I have raised questions as to the [57] constitutionality of the legislative plan. The objectors say that there is no irreparable harm, and I disagree with them. If the Act is unconstitutional now, it will be no less unconstitutional after the I.C.C. implements its plan or after the funds are disbursed, if that's the way that it turns out, and I assume, therefore, that expedition is best served by an appeal from the order that I entered most recently and to allow the appellate determination from there.

So, with some considerable expression of sympathy for the employees of the Rock Island, and concern, and while I don't expect them to accept this, since nobody believes

that you tell them something they don't want is for their own good, that even from the employees' point of view the most expeditious course is the one that I have just described and I have just announced.

Therefore, the motion of Messrs. Broadley, Rush and Clarke, or the motion joined in by all of them to vacate the injunctive order of June 9th is denied.

I guess that leaves you on your way to whatever court of appeals you decide you're going to, gentlemen. At least I hope you stay in touch with each other so you meet in the right court.

That will be the order on today's hearing.

MR. CLARKE: Your Honor, would it be possible to just ask one or two questions for clarification?

[58] THE COURT: I'll do my best.

MR. CLARKE: Your Honor, am I correct in concluding that your Honor has concluded tentatively and it's that finding, the tentative finding of law that is the basis of your injunction that the statute is unconstitutional insofar as it requires the taking from the Estate?

THE COURT: It is unconstitutional for more than one reason, and that's one of them.

MR. CLARKE: So we do have a finding on the constitutionality?

THE COURT: Yes. All right, gentlemen——

MR. RUSH: Might I ask a question also, your Honor?

THE COURT: All right.

MR. RUSH: There's been so much argument about it that it becomes a matter of increasing concern as to whether in your Junr [*sic*] 2nd order you did in fact, as has been argued, intend to rule that the imposition of any labor protection on the Estate could not be done constitutionally, or

whether—I guess I simply understood it as you simply held it wasn't required under Section 17 of the Milwaukee Restructuring Act.

THE COURT: I held originally that it was not required under Section 17 of the Milwaukee Restrucing [*sic*] Act. I added, and you have to always bear in mind that it was in the context of the ruling on an application for preliminary [59] relief, that it was my view that it was highly probable that the final outcome of the case would be that any imposition of labor protection by Congress on the Rock Island payable out of the Estate was an unconstitutional taking.

MR. RUSH: Thank you, sir.

THE COURT: All right, gentlemen.

(Which were all of the proceedings had in the above-entitled matter on the day and date aforesaid.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 B 2697

In the Matter of:

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,
Debtor.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled matter before the HONORABLE FRANK J. MC GARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Tuesday, October 7, 1980, at the hour of 2:00 o'clock P.M.

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[2] Broadley can start by addressing that.

THE CLERK: Motion of the United States to vacate preliminary injunction entered June 9th, 1980. Motion [3] of R.L.E.A. to vacate preliminary injunction and to direct Trustee to negotiate and declaration of I.C.C. not bound by June 9th, 1980 injunction in implementing Section 701 of the Staggers Act or lifting of prior injunction is taken under advisement.

THE COURT: Mr. Broadley.

MR. BROADLEY: May it please the Court, I am John Broadley from the Department of Justice appearing here for the Secretary of Transportation.

Your Honor, when we filed, or prepared our motion papers, we were anticipating that they recently enacted a rail deregulation bill which contains a Section 701 incorporating substantial amendments to the Rock Island Transition & Employee Assistance Act, would in fact be signed by the President today. Over the lunch hour I checked with the Domestic Policy Staff at the White House and

I was informed that the most likely date for actual signature would be Tuesday the 14th of October in the afternoon. I can't represent that the bill will in fact be signed. I think I can represent that I know of no substantial opposition within the Government to signature.

In order to save the Washington parties a second trip out here, we thought that it would be appropriate to at least hear the argument today, and for your Honor to take the matter under advisement pending [4] signature of the deregulation bill, or alternatively to assure an order, if you do decide to disolve [*sic*] the injunction, which would become effective upon signature.

THE COURT: I think that is appropriate. I will be willing to hear the arguments today, even though the bill hasn't been signed into law.

MR. BROADLEY: Your Honor, we have filed a motion and a very short memorandum, and attached the relevant portions of the Railroad Deregulation Bill which appear in the Congressional Record of September 29th.

MR. MANOS: Your Honor, may I respectfully interrupt, and I apologize to Mr. Broadley.

Do I understand that the Court is indicating that it wishes to hear all arguments, including the Government's argument as well as the Trustee ——

THE COURT: Well, I will hear the Government attorneys. They came out here in anticipation that we would be dealing with a bill that had been signed, and Mr. Broadley is correct that there is no use bringing them back Tuesday or Wednesday, whenever it is, so I will hear whatever they have to say on that subject.

MR. MANOS: Fine.

MR. BROADLEY: I have attached the relevant portions of the Congressional Record, and if your Honor does not

have a copy of the conference report which is in the [5] succeeding pages of the Congressional Record, we would be pleased to make one available.

The approach that Congress took in Section 701 of the Deregulation Act, is to take your Honor's decision of June 9th, 1980, in which you issued a preliminary injunction, and to address all the problems you found with the Act which bore on the finding of irreparable injury. It is really fairly simple in the way they made the changes. They have eliminated the anti-stay provision. As you recall, Section 106 D-1 of the Rock Island Transition & Employee Assistance Act, contained a provision prohibiting the Interstate Commerce Commission from staying its order, or any Court from staying either the order of the Interstated [*sic*] Commerce Commission or of this Court, which imposed and directed the implementation of a labor protection arrangement. That anti-stay provision has been removed in the proposed legislation. If you will notice the proposed legislation actually re-enacts Section 106, and 106-D, the new Section 106-D, does not contain anti-stay provision.

Secondarily, the Congress made clear that the Rock Island Transition & Employee Assistance Act did not, and does not affect the jurisdiction of the Court of Claims to entertain a suit under the Tucker Act in the event that any of the processes of the Rock Island—[6]I am going to refer to it as RIETA ——

THE COURT: All right.

MR. BROADLEY: —that any of the processes of RIETA effect the taking of the property of the Estate, and particularly they inserted two provisions. First of all, by inserting a new Section 124-C, into the RIETA, which makes it explicitly clear that the intention of RIETA was not to withdraw the Tucker Act jurisdiction. Secondly, they amended Section 110-E, which limited the liability of the

United States to make it clear that the limitation of liability was only a limitation of liability to employees. As you will recall, Section 110-E of the original Act, suggested that the Congress had intended to withdraw Tucker Act jurisdiction. That portion of 110-E which contained that suggestion was changed and an explicit provision put in which makes it clear that the Tucker Act jurisdiction is still available.

With these changes the basis for your preliminary injunction on June 9th, insofar as it relates to the question of irreparable injury, as we believe, will be eliminated. I might point out that there is one other jurisdictional change which was made. The jurisdiction of the Supreme Court to ultimately review any decision of the Seventh Circuit has been reinserted. As you will recall, the original Act withdrew Supreme [7] Court jurisdiction. The new Act changes that.

Since the basis for the finding of irreparable injury, which was necessary to support the June 9th preliminary injunction have been eliminated, we believe that the preliminary injunction should be vacated.

[8] Thank you very much.

THE COURT: Thank you, Mr. Broadley.

Mr. Rush, do you want to supplement that?

MR. RUSH: Thank you, Judge McGarr.

Henri Rush on behalf of the Interstate Commerce Commission.

The Commission takes a somewhat different view than the United States does of the matter, at least [9] at the outset. It is our position that because of the changes that have been made in the Act that it is essentially new legislation, and I have been asked by our general counsel to advise you of our position and belief, that upon enactment of that act the Commission is not bound in carrying out its

responsibilities under Section 701 of the Staggers Act, as the new legislation is called. We do not believe ourselves to be bound by your prior injunction, it being new legislation. That if you find the same infirmities exist that has prompted you to enter your other injunction, that a second injunction would be the appropriate manner in which to proceed.

We seek basically from you a declaration that would clear the air, indicating that you share our view that upon enactment 701 is different legislation, and the outstanding injunction no longer prohibits the parties from acting under the process set up in 701, which is, of course, 106 amended, with the changes that Mr. Broadley has pointed out which I will not reiterate. And also in connection with that we recognize that, of course, to make this process work we are going to have to have the cooperation of the Trustee. And, because upon signing, the time frame is very short. We believe it is appropriate to request that you specifically direct [10] him to so cooperate, and I am sure, upon your finding, that the process could and should go ahead, we would, but we do ask for that sort of direction also.

Alternatively we would join in the motion if you believe that your injunction will run through the new process as established, then we would ask that it be lifted so that that process may go ahead.

Our reading of the Regional Railway Reorganization Act cases in the Supreme Court is that the provision of the Tucker Act remedy cures, possibly, taking type constitutional infirmities, and we submit that that same result ought to obtain in this case and the process that Congress has sought to put into place for providing for Rock Island employees ought to be permitted to go ahead.

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[11] MR. CLARKE: With the Court's permission, my name is John Clarke and I represent the Railway Labor Executives Association.

Your Honor, we have also filed today a motion to vacate the preliminary injunction which was issued on June 9th. We have also asked for other relief in our motion, and that is that this Court direct the Trustee to negotiate with labor as will be required by Section 106-A of the amendments added by the Staggers Act, and also as now required to submit by 106-A of the Rock Island Transition & Employees Assistance Act. And if the injunction is vacated, those requirements come into force.

Your Honor, on Thursday of last week, we contacted the parties and informed them that we would be moving before the Court in a manner which we are doing today. On Friday we sent out a telegram to the Trustee, the Trustee's counsel, I should say, and then several of the creditors' counsel in this case. We would ask leave to submit to this Court a copy of that telegram indicating the notice which we gave to the parties that we would be appearing before the Court today.

THE COURT: You may.

MR. CLARKE: Your Honor, the reason why we are moving so speedily, especially now since the President has [12] considered, or is taking some time to enact to sign the legislation, is that once the Act is passed, it calls for a very strict timetable for both labor and management, and then on the I.C.C. The Trustee is directed by 106-A, where it says he may negotiate with labor for five days, or he may reach an agreement with labor. Actually that requires a negotiation with labor to reach an agreement, and we have five days to do it. Then if we don't agree within five days, the I.C.C. automatically has to assert jurisdiction over this matter and within ten day of that promulgate an arrangement. Therefore, it is extremely [*sic*] that we know right from the very beginning whether or nŏt the Trustee will take part in those negotiations, because we don't have any time to come back and forth to court and try to work it out since the five days will run

while that is ongoing. And if the past is any indication of what we can expect in the future, when the Rock Island Transition Act was initially enacted, back in May, on May 30, the Trustee at first asked for a postponement of the hearing at a meeting scheduled before the National Mediation Board, and it was postponed at his request until the next week. Then the Trustee declined to attend after postponinig [*sic*] it once more because of his view that the Act was unconstitutional and he could not take part. Now, of course, unfortunately what has happened since [13] that time, it was on June 2nd that this Court ordered the abandonment of the entire System and ruled that there would be no labor protection, no protection for employees as a result of that abandonment. The Rock Island Transition Act applies a protection, a compromise-type of protection for employees. And if the Trustee's position on the various sales that have been before this Court is any indication of what we can expect in the Rock Island Act, the Trustee will take the position that the order of the Court authorizing abandonment, declining to impose protection, automatically ends any obligation the Trustee might have to negotiate with labor for a protective arrangement. Therefore, we submit that this matter is now ripe before this Court to make a decision, and we would ask that when the Court considers the various pleadings and determines whether or not to vacate its injunction, that it also, at that time, consider whether or not it should direct the Trustee to negotiate. We would submit that the Railway Labor Act, which is still applicable to the Trustee, since he is still a carrier, even under this Court's order authorizing the abandonment, he is a carrier until the 180-day period ends, at least that long, but we submit longer, but as far as this Court need be concerned, since the Court has delayed part of the abandonment from 180 days from its order, the Trustee [14] is still carrying under the Railway Labor Act, under the Interstate Commerce Act, and therefore under the Railway Labor Act as well. He has an obligation

under Section 2, first to attempt to resolve any disputes between parties, between himself and labor, and also to reach and make agreements. One of the mandatory items which he now has to bargain about, according to Congress, is protection for employees, and therefore, we would submit that it is proper for this Court to direct the Trustee to engage in those negotiations.

Now just briefly, as to the relief that R.L.E.A. is seeking on the motion to vacate. We would submit, your Honor, that the signing, once the Staggers Act is actually signed, the injunction which this Court issued back in June would become moot at that point. The appeal which R.L.E.A. has taken would become moot at that point. Until then, however, there is still a basis for this Court to vacate that injunction. The only reason, substantive reason that can be given, and has been given, by the Supreme Court, for example, Mr. Justice Stevens' decision, and by your Honor, the only articulated reason was that the Act effected an unconstitutional taking of property.

The Act now provides, or we initially argued, that that unconstitutional deprivation of property was [15] not irreparable harm, if it was unconstitutional in this case, because the Tucker Act was avaialable [*sic*] as a remedy. This Court, during the oral argument, at the conclusion of it stated, that it is questionable whether or not the Tucker Act is available, and if it is not available, then it is clear that the Estate would be harmed, that the creditors would be harmed. Since if there is an unconstitutional taking they would have no remedy to recover their funds.

Congress' passage, near passage of the Staggers Rail Act of 1980, where it expressly states in its conference report that it has made explicit in the statute what it always intended, namely that the Tucker Act would be available. That it would not take the Tucker Act remedy away. It eliminates the argument that can be made whether or not the President signs the bill that the Tucker Act

remedy is not available to the creditors or to the Estate in this case. So therefore, we submit, that the irreparable harm that could have resulted from an unconstitutional taking of property does not exist, and there is a speedy appellate procedure built into this Act, and before there can be any real money being given out to employees as a result of the arrangement that might be promulgated in this matter, or agreed to, the constitutionality of this can be [16] decided by the Court of Appeals. As the record in this case show, or the record in the previous injunction shows, a similar type of legislation took 56 days to fund on the Milwaukee, where we had a willing trustee, and a willing processing of the matter. Here we do not have that. We have a long road ahead of us. So it is, we submit, very unlikely that there will be any funds actually paid out prior to the decision on the constitutionality. But, in the meantime, we have lost approximately four months while we have been hasseling about the constitutionality of the Act. Those four months, or four more months where employees are running out of unemployment compensation, if they were entitled to it, which totals $25 a day or a total of $125 a week. In today's times it is hardly enough for anyone to make ends meet for any amount of time.

We are at the point where there is a drastic need for the funds for the employees. We submit that we have to go forward as readily and speedily as possible. To do that we would submit, in the best interest of all, that this Court vacate the injunction immediately upon the signing of the Act, if not prior to that time. Thank you.

THE COURT: Thank you, Mr. Clarke. Mr. Manos, do you want to respond?

[17] MR. MANOS: Your Honor, I am going to respond very briefly, because by the very nature of the presentations by the three gentlemen, Mr. Broadley, Mr. Rush and Mr. Clarke, it would appear that there are many matters that the Court must carefully consider before granting the respec-

tive relief to which each of the said gentlemen addressed themselves to. And each one has really approached this a little differently. There are many things that each of them ask, but central, however, to everything that they are stating is that now the Staggers Act gives us, or gives the Court or gives the parties relief by injection of two lines in the new Act which state that the Tucker Act relief is available.

I believe that Mr. Broadley's statement is quite accurate when he says that what has occurred here is that there has been a pronouncement of the jurisdictional, a statement of the jurisdictional confirmation of what the Tucker Act does, and it is purely that and nothing more. And this, of course, is something that the Trustee wishes to address very carefully when we are able to respond to this in writing and to present the oral argument of the Trustee, and I am sure the other parties wish to address the same issues.

So, your Honor, in response, or my immediate reaction to what I have heard today, is that [18] we need the opportunity, first of all, to react in writing so that the Court can make a recent decision, and also the immediate reaction that the unconstitutional taking still exits [*sic*]. And the Tucker Act jurisdictional statements, that is now contained in the Staggers Act does not cure that taking. So that the basis that previously existed or existed when your Honor entered its preliminary injunction, is still exists. The irreparable harm is still there. I will be in a position for the Trustee to respond to the oral statements and to the simple pleadings that have been filed here today by the three gentlemen so as to justify the need for the continuation of the preliminary injunction, the refusal or the denial of the relief that is asked by the gentlemen, or as Mr. Rush put it, alternatively, and also the additional reaction to this entire matter, serious as it may be. That while we are in sympathy, yes, that there is a need for perhaps some employee relief. This relief must not come from this particular estate. Let the Government come up with a grant if it desires to do so, but the imposition of a claim against this estate, in the

manner now that Congress has, within a few days of the election decreed, seems staggering beyond all comprehension.

THE COURT: That is why it is called the "Staggers Bill." [19] MR. MANOS: This is the "Staggers Bill," excuse me, I didn't mean it in that fashion, but it is staggering.

Anyway, the type of legislation that calls upon all of the parties now within 60 days, it calls upon the Seventh Circuit to make decisions within 60 days, to do so on a reason [*sic*] basis, and for the reason that they say there is a great public benefit, a great private benefit to the Estate. These are the matters, your Honor—I don't wish to make the argument now—these are the matters that we will address on the next date, your Honor.

Now with respect to the next date, your Honor, I feel that the indication of the Court was that he wanted to hear Mr. Broadley, Mr. Rush and Mr. Clarke, so that they might be able to get back, but we would like some considerable time here—did I understand Mr. Broadley to say, or Mr. Clarke to say that the signing is not expected until the 14th, am I correct?

THE COURT: That is their best information. I don't think any of us can take that as absolutely guarantied [*sic*], but that is apparently the best information.

MR. MANOS: If that is the case we are looking then to next Tuesday for President Carter, if he is going to do it. Of course, that is another element that is kind of surprising in today's proceeding, that we are talking about a law that isn't even a law. If he does sign this [20] on Tuesday, I feel, your Honor, that this Court should not, not even address a prospective law, should be looking at a law when it is a law, and if that is not going to be until Tuesday, perhaps Tuesday or thereafter, as the Court sees fit should be the date that the matter should be argued and addressed for an expeditious decision by the Court. In the interim,

if we can file—we have to file here in response to what has been stated here today, the Court and all the parties will have at least an opportunity, though slight, only a few days, of presenting to the Court for its reason [*sic*] decision some of the arguments that the Trustee wishes to advance, and I'm sure all of the other parties here as well. Thank you, your Honor.

THE COURT: Do any of the creditors wish to address this subject?

MR. MURRAY: Your Honor, Dan Murray for the Intervenors Crown, et al.

If your Honor please, we are not in a position today to give a full exposition of our views on the Harley O. Staggers Act of 1980, insofar as it relates to the Rock Island, and the reason we are not, your Honor, is that the Act was only recently made available to us, and indeed, it has not even been signed into law and approved by the President. Therefore it would be premature, in our view, for the Court to take [21] any action with respect to this legislation today. The issue only is presented to your Honor, if and when the President should sign the Act into law, and, indeed, we find it extraordinary that the matters have been addressed both to this court and indirectly to the Seventh [Circuit] Court of Appeals this morning. In our view the matter is not ripe for this Court's consideration until the bill is signed into law.

THE COURT: Let me say, Mr. Murray, that the reason for that, and I, perhaps, am more tolerant of it than you, is that the earlier indication was that it was to be signed into law Friday or Monday, and that is why.

MR. MURRAY: I understand that, your Honor.

In any event, your Honor, what we would like to do is to have leave to file a more extended statement of position. A brief on this subject. This afternoon I would only

like to cover a few very basic points and leave the more detailed argumentation to our brief, or whatever oral argument follows thereafter.

I think several significant admissions have been made by the United States and by the Interstate Commerce Commission and the Railway Labor Executives [*sic*] Association today. In the first place, we have been told by the attorney for the Railway Labor Executives [*sic*] Association, as we were told several months ago on the [22] original argument on this matter, that there is really no assurance that the monies will not be paid out. The $75 million will not be paid out. He alluded to the fact that it took a certain number of days, 57 days, for the Trustee in the Milwaukee Road case to eventually pay out monies. But the fact of the matter is that the minute the Act takes effect there is created on this Estate a lien that will eventually be realized within a very short period of days, and this Estate can ill afford to have any prior lien of this nature placed upon it, and your Honor has so ruled. The Estate of the Rock Island has already been burneded with expenses of administration well in excess of the thirty million that were incurred just prior to the order to liquidate that your Honor entered in January of this year. The Rock Island has many other expenses, prior expenses that burden this Estate. The Trustee is attempting to conduct a liquidation proceeding in a most precarious set of circumstances. The fact of the matter is that the Rock Island Estate, as your Honor knows, has had numerous petitions brought into court against it, to realize on the payment of expenses of administration claims. The immediate relevance of that is that the Rock Island, even to this day, is carrying out business in terms of the liquidation that requires suppliers to supply it with materials. That requires [23] people to afford it, carry on business relationships with the Rock Island. These people have to rely upon the fact that the Rock Island can conduct its affairs in an orderly manner. The fact of the matter is that the $75

million prior lien placed on this Estate, when the funds that are available, the liquid cash that is available is so meager, there is real doubt in my mind that the Rock Island is going to be able to carry on. I do think there is very severe irreparable injury. Even if that were not the case, the fact of the matter is that there is a violation of the constitutional rights that will occur when a lien is placed on the Estate. It is not something that is going to happen in the future. It is going to occur when the Act takes effect and this process gets under way. So there will be a disruption of the liquidation process. There will be an impermissible lien that will be placed on this Estate. For those reasons alone, your Honor, we believe that this Estate has suffered irreparable injury and that this injury cannot be permitted to occur if this Act is permitted to be implemented.

There are other matters in this Act that gravely concern us, especially matters concerning the procedure, the summary procedure that this Act sets up that is of great concern to us. The unprecedented very strict and compressed time periods that are provided [24] for judicial review. The mandating of consolidation of the case with the Milwaukee Road case in the Seventh Circuit Court of Appeals. The mandating that the case be heard in the Seventh Circuit of Appeals en banc, as with the earlier Rock Island Transition & Employees Assistance Act. This particular Act contains extraordinary procedural provisions that violate the separation of powers clause. It violates the due process and equal protection clause. It violates the uniform laws on the bankruptcy clause of the United States Constitution. In that respect I should point out, your Honor, the unequal treatment that occurs as between the Milwaukee Road, the Rock Island Railroad and Conrail. The Milwaukee Road has very substantial indebtedness forgiven it by this Act. It could be well in excess of $50 million that could be forgiven if certain events occur. Conrail is provided in this same Act very substantial funds for labor protection

as a gift, as a grant. The Rock Island is treated completely differently in this Act, and we believe that that violates various provisions, including the uniform laws on bankruptcy provisions of the United States Constitution.

Your Honor, today, we are not prepared to go into all the details in which the way this Act is of concern to us. I have pointed out the irreparable [25] injury provision. I would also be concerned that the matter of the Tucker Act, in our view, is only a cosmetic matter. The Act only provides that the Tucker Act remedy is not precluded. It doesn't grant that remedy, and, indeed, there is no recognition on the part of the United States that there is liability. It is dramatically different than the Penn Central case, which arose in the 3-R Act cases, and we will point that out at length in our brief. But the fact of the matter is that here we have a prospective violation of constitutional rights, and it is inconceivable to us that the Congress can permit a violation of the Constitution and cure that violation by providing that at a later date some sort of recovery might be had, or is not precluded because a lawsuit may be filed under the Tucker Act. We do not believe that that is the kind of protection to which individuals are entitled under the Constitution. It seems to us the judiciary has an obligation to provide much more substantial protection of individual's constitutional rights.

Your Honor, these are all the matters I would be prepared to discuss today, but, as I say, I would like the opportunity because of the very grave questions that are presented in this legislation to have the time in which to brief this matter. I would point out to your Honor that in the appeal that was filed by the [26] Railway Labor Executives [*sic*] Association, and the papers that were filed with the Supreme Court, the intimation was that we did not have sufficient time in the earlier proceedings to consider these matters. I don't agree with that but I think we ought to have the time to carefully consider these matters, to brief this

question, and in the interim nothing should proceed. The Estate should not be prejudiced in any way until your Honor has had the time in which to carefully consider all of the very grave questions that are raised by this extraordinary and unfortunate piece of legislation. Thank you, Your Honor.

THE COURT: Mr. Murray has covered the grounds for the creditors, if you want to supplement it briefly, you may—Mr. Moritz, do you have something——

MR. MORITZ: Your Honor, I like Mr. Murray, find that I am not prepared to lay out all of the deficiencies in the Act. I would adopt Mr. Murray's comments. I would like to reemphasize one very critical aspect of this new legislation as contrasted with the legislation that was challenged before this Court in June of this year, and that the Court found to be constitutionally deficient.

What this Court determined there, and I am referring to the transcript of proceedings at Page 77 and 78, was that there was an unconstitutional taking [27] by reason of the imposition of labor protection obligations. The existence or the absence of the Tucker Act was tangential to that central determination. We have a finding that labor protection violates the rights of this Estate, and that the violation, if permitted to go forward, would constitute a clear violation of Fifth Amendment rights that the Estate and the creditors enjoy. When the R.L.E.A. moved to the United States Supreme Court for a stay of this Court's injunction, that very same issue was focused on by Mr. Justice Stevens. In R.L.E.A. vs. Gibbons, and I don't have the cite, but it was decided June 28th, 1980. Mr. Justice Stevens said:

> "Having read the parties' submissions, I am of the opinion that Judge McGarr was probably correct in concluding that the Act authorizes an unconstitutional taking of the property of the Estate. It appears to direct a transfer of $75 million off the top of the Es-

tate assets to the employees. While such a transfer might be permissible in the course of a genuine reorganization, at least at this moment I have difficulty perceiving how, in the context of a liquidation, this is anything other than a simple taking of the property of the general creditors, as the Trustee argues."

The new Rock Island provisions in the Act [28] that is before the Court today makes no change in that fundamental determination by this Court as acknowledged by Mr. Justice Stevens. There is still a taking. It is still $75 million off the top of the assets of the Estate. All that Congress has done is add the language in the statute that a Tucker Act remedy may be available. Now the Tucker Act isn't a provision to permit Congress to violate a constitutional right of citizens, and then permit litigation to follow thereafter to attempt to redress those rights. That is now what the Tucker Act is intended to do. Indeed, the Tucker Act would be an abominable piece of legislation if it permitted constitutional rights to be violated willy-nilly by the Congress, with rights of relief sometime thereafter in the courts. We think we can establish that point firmly and we would like the opportunity to brief that and the other points, the other deficiencies in this Act.

I would join in Mr. Murray's comment that I think that a reason [*sic*] consideration by this Court is appropriate. We are not interested in creating problems for the people Mr. Clarke represents, but we feel that Congress is attempting to do here something which the Constitution was designed to prevent.

THE COURT: I think I should make some comments on this.

[29] As has been pointed out, it is in effect, a discussion of problems created by a law that is not yet a law but which will very probably become one soon. For that reason, I think the discussion is appropriate.

What I have before me, to be more precise about it, is motions by three parties to vacate a preliminary injunction, which I entered on June 9th, 1980. I have listened to the arguments on this. I have formed some tentative opinions. I don't really intend to rule on those motions because everybody is entitled to a little more chance to develop the matter with themselves and with me, and, of course, we should wait until it becomes a reality. I think these observations of mine are pertinent only because of the suggestion of Mr. Rush that I might find his position so appealing that I would agree now that the Commerce Commission is correct in regarding my former injunctive order as not binding upon them because this is in effect new and different legislation. I want to make my position clear so that there is no misunderstanding between myself and Mr. Rush and/or the Commission.

Actually, as has been adverted to, the basic vice of the Act which I held unconstitutional was the imposition of the cost of the Rock Island Rehabilitation Act on the Estate and thus on the creditors. I issued [30] a preliminary injunction basically because I found the Act unconstitutional and thought it was my duty to enjoin the carrying out of the programs set forth by Congress seeking the unconstitutional goals that I found.

We had discussions of whether a preliminary injunction was issuable, and we discussed the traditional irreparable injury concept that goes with that determination. I did issue the preliminary injunction accompanied by a finding, among other things, that there was irreparable injury. The bill, as I now see it, amends and attempts to cure some of the procedural problems with the Act which was before me in an effort to remove the irreparable injury argument concerning the old Act. The new bill does not address the basic finding of the Court that the whole program which has been changed only cosmetically, to borrow somebody else's word, was an unconstitutional deprivation. I held that and an appeal is in progress. The argument that the Tucker Act is available and therefore we could go ahead with the

unconstitutional taking because the Tucker Act will allow everything to turn out in the end really does not impress me. I share Mr. Moritz' comment, or argument, that you do not proceed, nor must the Court allow proceedings under what is patently unconstitutional legislation because there is a remedy somewhere down the line that may straighten things out. [31] It really is not at all clear to me that to disperse the money now, to allow the claim against the assets of the Rock Island to accrue, to say to the Trustee that if this is all unconstitutional you can sue under the Tucker Act and get it back, is even to cure the irreparable harm argument. Mr. Murray argued that the very fact of the existence of the $75 million lien on the assets of the Rock Island is irreparable injury as it overshadows the efforts of the Trustee to continue the liquidation process relying, as he must, on the ability and willingness of people to extend credit under cost of administration terms.

So, as I said, my initial impression without ruling on it is that the new bill does not cure the old problem.

Mr. Rush asks me to agree that it is new legislation so that the old injunction, which he has moved to vacate is no longer binding on the Commission, and I would like to make it clear that I do not agree. This is not new legislation in my view. This is amended legislation which attempts, but fails, to clear the underlying flaws which caused me to find the bill unconstitutional in the first place. It remains basically the same law with the same defects and is subject to the same injunction. So, while I am not ruling on the motion [32] to vacate the injunction because I would like the parties to have an opportunity to develop the matters as fully as they wish before me, I am making these comments to make it clear that I do not agree with the Commerce Commission's suggestions that the injunction is no longer binding on them.

I think what we had better do, gentlemen, is to allow the various people opposing the motion to file some very quick

responses, and then give Justice, the Commerce Commission and Mr. Clarke an opportunity to reply so that they will have a change to air their views on it.

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[35] MR. CLARKE: Your Honor, on behalf of Railway Labor, it is critical that we have an order by Tuesday, because if your Honor rules the way it appears, in light of your tentative conclusions on this matter, we will have to immediately go for a stay of the injunction again, and that means immediately right up to the Court of Appeals because we have to get negotiations ongoing in the five-day period, or else the I.C.C. will take over, and if we take five days ironing out the legal positions of the parties, and whether there is an injunction or not, we lose those five days, and there is no provision in the Act for a holding——

THE COURT: Assuming a ruling that I continue to believe it is unconstitutional, obviously you are not going to get the Trustee to negotiating within the five-day period.

MR. CLARKE: Unless the Court of Appeals tells him to.

THE COURT: All right, unless the Court of Appeals tells him to——

MR. CLARKE: Yes, sir.

THE COURT: On the other hand, assuming that you get a ruling on Tuesday and you have got five days, which takes [36] you through the following Saturday or Sunday, it would be miraculous to get a Court of Appeals to do anything in that short a span.

MR. MANOS: There is another presumption, your Honor, that the negotiations could be fruitful.

THE COURT: I could never understand why Congress imposes this Draconian time limit of five days on the matter. I have never seen them request to do anything under ten or fifteen or twenty before, but that is beside the point, it is there and we have to deal with it.

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Order of the United States District Court
October 15, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 B 2697

In the Matter of

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Debtor,

WILLIAM M. GIBBONS, as Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; and HENRY CROWN, ET AL.,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, *Defendants.*

PRELIMINARY INJUNCTION

This matter is before the court on the motion of intervenor Railway Labor Executives Association ("RLEA"), requesting this court [to] vacate the preliminary injunction issued on June 9, 1980, enjoining enforcement of sections 106 and 110 of the Rock Island Transition and Employee Assistance Act ("Rock Island Act" or the "Act"), 45 U.S.C. §§ 1005, 1008, on the grounds that all constitutional defects have been remedied by passage of the Railroad Transportation Policy Act of 1980 ("Staggers Rail Act of 1980"), H.R. Rep. 1430, 126 Cong. Rec.-House 9892 (Sept. 29, 1980). The trustee and certain creditors also seek a declaratory judgment and injunctive relief declaring the Rock

Island Act as amended by the Staggers Rail Act, unconstitutional and enjoining its enforcement. In anticipation that the Staggers Rail Act would be signed into law, the court heard arguments on October 7, 1980, from all interested parties, addressed to the effect of the Staggers Rail Act on the court's preliminary injunction.

This court issued a preliminary injunction on June 9, 1980, when, based upon findings of fact and conclusions of law delivered from the bench, the court concluded that "the probability of determination of unconstitutionality of this Act after more mature consideration and deliberation is exceedingly great. . . ." Transcript of Proceedings, June 9, 1980 at 81. Specifically, the injunction prevented the Interstate Commerce Commission and the Secretary of Transportation from imposing a $75,000,000 loan with cost of administration status on the bankrupt estate. These proceeds were to fund a labor protection arrangement created under the Act. This determination was based upon the court's finding that the provisions of the Act mandated a taking of private property of the estate without compensation, in violation of the fifth amendment.

On June 28, 1980, United States Justice John Paul Stevens denied RLEA's motion for a stay of this court's injunction.

The Staggers Rail Act became law on October 14, 1980. It amends certain provisions of the Rock Island Act and re-enacts the labor protection obligations previously found unconstitutional by this court. The re-enacted labor protection requirements appear to be essentially the same as under the original Act except that the time available for the trustee and the Commission to respond is shortened and the anti-stay provisions of section 106 have been eliminated.

This court has studied the Staggers Rail Act amendments to the Rock Island Act, has reviewed carefully the

arguments of counsel, the documents filed by the various parties, the ruling of June 9, 1980, and the court's knowledge of these proceedings, and it remains clear that the Rock Island estate continues to be exposed to irreparable injury by the provisions of the Rock Island Act as amended by the Staggers Rail Act. The Staggers Rail Act does not cure the defects found in the Rock Island Act. Like its predecessor, the Staggers Rail Act imposes a $75,000,000 cost of administration claim on the Rock Island estate with priority over claims of general creditors and shareholders on the assets of the estate.

Petitioner argues that the statutory scheme can be implemented, the money disbursed, and the validity of the program and extent of the Rock Island liability to finance it, later litigated. This, in fact, cannot be done without irreparable injury to the administration of the estate for the benefit of the creditors. The trustee is currently liquidating assets and preparing the plan for distribution to creditors. Under court order, the trustee is also preparing an interim plan for the immediate partial satisfaction of cost of administration claims. The imposition of a $75,000,000 uncertainty on the estate will totally halt the liquidation for the long period consumed by the appellate process, with irreparable injury to the already long-suffering creditors. Further, the whole liquidation plan will be distorted by the brooding omnipresence of a potential liability representing a significant percentage of the total assets.

Pursuant to the requests for relief in the written filings and arguments of counsel, the court orders the issuance of a preliminary injunction.

1) The Rock Island Act as amended and re-enacted by the Staggers Rail Act effects an unconstitutional taking of private property in violation of the rights of the Rock Island estate, its creditors and shareholders which are secured by the Fifth Amendment of the United States Constitution.

2) The implementation of this Act will constitute irreparable harm to the estate.

3) The court's injunction of June 9, 1980 remains in full force and applies to sections 106 and 110 of the Rock Island Act, as amended and re-enacted by the Staggers Rail Act.

4) The court orders the issuance of a preliminary injunction:

a) preliminarily enjoining the Interstate Commerce Commission from asserting jurisdiction to consider or to impose any labor protection arrangement or obligation under the Rock Island Act as amended and re-enacted by the Staggers Rail Act; and

b) preliminarily enjoining the trustee, William M. Gibbons, from entering into negotiations respecting any labor protection agreement and from implementing any labor protection agreement under the Rock Island Act as amended and re-enacted by the Staggers Rail Act; and

c) preliminarily enjoining the United States Secretary of Transportation from requesting, approving or guaranteeing any loan or obligation on the estate of the Chicago, Rock Island and Pacific Railroad Company under the provisions of the Rock Island Act as amended and re-enacted by the Staggers Rail Act.

ENTER:

/s/ FRANK J. McGARR
United States District Judge

DATED: October 15, 1980

Order of the United States District Court
October 16, 1980

The Preliminary Injunction entered October 15, 1980 is hereby corrected as follows:

1) p.1, lines 1 and 2 [p.205a, lines 1 and 2 and first three words of line 3] should read: "This matter is before the court on the motion of intervenor Railway Labor Executives Association ('RLEA'), joined by the United States and the Interstate Commerce Commission, requesting this court. . . ."

2) p.3, line 13 [p.207a, lines 9 and 10] should read: ". . . Island estate with priority over claims of creditors and. . . ."

3) p.4, line 4 [p.207a, line 29] should read: ". . . arguments of counsel, the court orders the continuance of the preliminary.

4) p.4, line 16 [p.208a, lines 7 and 8] should read: "4) The court orders the continuance of the preliminary injunction: . . ."

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

(Argued *en banc* November 13, 1980)

December 16, 1980

Before HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. WILLIAM J. BAUER, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*
HON. RICHARD D. CUDAHY, *Circuit Judge**

In the Matter of:

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Debtor,

Nos. 80-2487 and 80-2536
Appeals of:

RAILWAY LABOR EXECUTIVES' ASSOCIATION; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, *Defendants-Appellants.*

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

No. 75 B 2697

FRANK J. MCGARR, *Judge.*

ORDER

This is an appeal from an order entered by the district court October 15, 1980, continuing in effect a preliminary

* Circuit Judges Walter J. Cummings and Wilbur F. Pell, Jr. did not participate in the *en banc* hearing.

injunction issued June 9, 1980; the injunction bars the Interstate Commerce Commission, the United States Secretary of Transportation, and the Trustee of the Debtor from complying with the labor protection requirements of Rock Island Transition and Employee Assistance Act, as amended by the Staggers Rail Act.

We heard the matter *en banc* pursuant to the Staggers Rail Act. Those circuit judges in regular active service who deem themselves disqualified did not participate. We took with the case a motion to dismiss on the ground that the issue is pending before the Supreme Court, an appeal having been taken from the injunction of June 9, 1980 before enactment of the Staggers Rail Act.

We all agree that in view of the Staggers Rail Act the motion to dismiss the appeal should be DENIED, and IT IS SO ORDERED.

On the merits, Judges Fairchild, Sprecher, and Cudahy voted to reverse the order appealed from. Judges Swygert, Bauer, and Wood voted to affirm.

The Court being equally divided, the order appealed from is necessarily AFFIRMED.

IT IS SO ORDERED.

Related Transcripts, Orders and Reports

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 B 2697

In the Matter of:

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,
Debtor.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled matter before the HONORABLE FRANK J. MC GARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois on Friday, the 21st day of September, 1979, at the hour of 4:00 o'clock p.m.

* * *

[7] MR. MANOS: Your Honor, the fact of the matter is that President Carter yesterday exercised his presidential powers and created, or announced the creation of an emergency board. Now I won't go into details relative to the Executive Order. It is a short one. It is dated September 20th, 1979 from the White House. Most of the details relative to the Executive Order are contained in the media, but nevertheless, for the record, let me state—let me read it into the record, if I may, your Honor, it is a very short one.

THE COURT: All right.

MR. MANOS: This is an Executive Order, this is dated from the White House, September 20th, 1979 creating an emergency board to investigate disputes between the Chicago, Rock Island, Pacific Railroad and Peoria Terminal Company and the Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express and Station Employees and the United Transportation Union.

"Disputes exist between the Chicago, Rock Island & Pacific Railroad and Peoria Terminal Company and certain of its employees represented by both the Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, [8] Express and Station Employees and the United Transportation Union. These disputes have not heretofore been adjusted under the provisions of the Railway Labor Act as amended, and these disputes in the judgment of the National Mediation Board threatens substantially to interrupt interstate commerce to a degree such as to deprive a section of the country of essential transportation service. Now, therefore, by authority vested in me by Section 10 of the Railway Labor Act as amended, 45 United States Code 160, it is hereby ordered as follows: Section 1-101. Establishment of Board: There is established a Board of three members to be appointed by the President to investigate these disputes. No member of the Board shall be peculiarly or otherwise interested in any organization of railroad employees or any carrier. Section 1-102, report: The Board shall report its findings to the President with respect to these disputes within thirty days from the date of this order. Section 1-103. Maintaining conditions: As provided by Section 10 of the Railway Labor Act as amended, from this date and for thirty days after the Board has made its report to the President. No change, except by agreement, shall be made by the Chicago, Rock Island, Pacific Railroad and Peoria Terminal Company, or by its employees, in the conditions out of which these [9] disputes arose."

Your Honor, while we have not been formally served by anybody with the Executive Order we have a copy of it and we acknowledge that the Order was entered by the President. We need no formal announcement of the fact.

Your Honor, this morning Mr. Gibbons sent telegrams to Mr. Fred Kroll, and also to Mr. Chester, the gentleman representing the Brotherhood of Railway, Airline & Steamship Clerks and the United Transportation Union, respectively. The telegram in content is the same as to each gentleman, and I would like to read that into the record.

> "Concerning President Carter's appointment of an emergency board to review our dispute to accomplish orderly return of employees to work, in accord with our returning business, we require your prompt cooperation. Please advise when UTU"——

and the other telegram, your Honor, obviously it said "BRAC."

> "—Please advise when UTU will comply with President Carter's Executive Order."

Now, your Honor, this was signed by the Executive Vice-President of the Railroad. We have not received a response to the telegram from the Brotherhood of Clerks. We have received, as of September 21st at 2:16 p.m. a telegram from Mr. L.H. Chester, the President of the United Transportation Union addressed to the Executive Vice-President, Mr. Mitros [10] of the Rock Island Railroad.

> "In re: Your telegram September 21, 1979. Alleged appointment of emergency board, Rock Island Railroad. Upon receipt of official notification of President Carter's Executive Order and appointment of an emergency board we will advise you the UTU return to work arrangements."

This is signed L.H. Chester, President.

Your Honor, to this moment we have not received, but hopefully and expectantly are awaiting a response from BRAC. We are quite anxious, your Honor, and the Trustee

is quite anxious to meet with the two Unions and to arrange a back to work, in line with the Executive Order of President Carter.

THE COURT: It is not unreasonable to assume, since you didn't receive an official service of the order, and UTU said they haven't received it, that maybe nobody as yet received it.

MR. MANOS: Your Honor, I do believe it has been entered. I saw President Carter announcing the Board——

THE COURT: I am sure it's been entered, the President has announced it, the Fedral [*sic*] Railway Administrator called me and said that it had been entered. I suppose if the Unions are taking a position that until it is served upon them they are not going to recognize it we have to deal [11] with that position. Go ahead.

MR. MANOS: Now, your Honor, with respect to today's status report hearing. Your Honor knows that late in the month of August, I believe August 27th or 28th, the strike occurred. The strike was brought first by BRAC and then by UTU. I won't go into the details that led to the strike by the two Unions, and which included then a walk-out by all of the other unions.

Since that date the Rock Island, in the exercise of its common carrier obligation, has been operating to the best of its ability, which leads us to today's status report with respect to cash and the cash requirement attendant—the on-going strike operation of the Trustee.

Now, your Honor, I have noted as I walked into this courtroom the presence of many parties in interest. They are parties in interest. I have noticed the representatives and the attorneys of BRAC present in the courtroom. They have a right to be here, and certainly they have an urgent interest in the proceedings.

I have noticed that there are representatives of UTU. They equally have a right to be here. . . .

• • •

[21] [THE COURT:] Mr. Manos raises today the problem which I isolate as the issue of being unwilling to discuss the cash position of the Railroad in the atmosphere of the strike. Now that makes a lot of sense if you are in the middle of a strike. The problem we have with it now is that presumably by Presidential Order the strike is over and everybody is supposed to go back to work. It is unfortunate that the Unions are playing "dog in the manger" and pretending they don't know about this and that they are not going to adknolwedge [*sic*] it until they are served and so forth. Sooner or later I suppose somebody is going to catch them and they are going to have to read the order and they are going to have to comply with it, and I can make no assumption other than that they will comply with it. However unhappy they may be with it I am sure the Unions like everybody else are going to obey a Presidental Order and I would hope and expect that they would sit down immediately and that they would discuss with the Rock Island the mechanics for getting them back to work and getting the Railroad running again. Any other result would surprise me. The only open question is when the Unions [22] are going to face up to this problem and get down to negotiating and discussing it.

• • •

[33] [MR. BROADLEY:] As your Honor pointed out, we are hoping that the Unions comply that the Rock Island complies with the President's back to work order under the Railway Labor Act. I presume if they don't comply my colleagues will attempt to seek appropriate injunctions to require them to comply. The Trustee himself, in a document which I believe he filed with the Court yesterday, said—the end of the last page—my estimates of start-up

costs for such resumption is 30 million. All of these monies to be allocated to repair damage caused by the strike and for immediate working capital to resume essential services.

Getting a railroad back into operation after a strike of this long raises many, many questions of extraordinary expense. Grinding rails, inspecting—that type of thing which I won't go into because I don't pretend to be an expert on them.

• • •

[58] THE COURT: We are past that. I was sympathetic to that when you started because I understand your position vis-a-vis the unions. But everything I hear about the Rock Island and the immanence of the crisis of necessary cessation because of the lack of cash suggests to me that the problem of the strike and whether the Union is going to obey the Presidential Order tonight or tomorrow or the next day are minuscule compared to the problem of whether you can keep going [59] in view of the piling up of obligations to October 10th. That is the thing that Mr. Broadley picked off a whole series of obligations, and also asked for an explanation of how you are going to handle the 30 million start-up cost which is your figure. Maybe you want to respond to that.

• • •

[60] THE COURT: I haven't heard anyone willing to give you the 30 million. In our conference in chambers the FRA said no.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 B 2697

In the Matter of:

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,
Debtor.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled matter before the HONORABLE FRANK J. MCGARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Wednesday the 23rd day of January, 1980, at the hour of 2:00 o'clock p.m.

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[3] [MR. MORITZ:] . . . One of the principal purposes of being here today was to present the Court with the Peat, Marwich [*sic*] & Mitchell study. Hr. Hill, and the staff of PM&M, met with the creditors and with the Trustee and their staff the better part of this morning and the early afternoon and they are present in court now.

• • •

[10] THE COURT: I think you have completed your statement. I now know that all is not sweetness and light in the matter of the PMM study and that there is going to be some concern as to whether portions of it should be re-cast or re-done afterwards. Knowing that maybe I think it is appropriate that I hear from Mr. Hill at this time as to what he has done and what he has presented.

Mr. Hill, would you come up and give me the background of the presentation of the report, bearing in mind that you were and are in effect a witness of the Court and that it was at the Court's request that you did this study and

that somewhere shortly after you started it we changed its direction somewhat. I would just like your statement concerning this large fat document that Mr. Manos is waving around which I haven't seen yet.

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THE COURT: For the record will you give your full name, Mr. Hill?

MR. HILL: My full name is Donald M. Hill, Principal, Peat, Marwick & Mitchell.

[11] THE COURT: All right, go head.

MR. HILL: You know, as you stated, we commenced our Phase I study during the middle of October. We presented the results of our Phase I study on December 11th and the findings of our Phase I are included in this document as Appendix A.

What is key to today's discussion and the lengthy discussion with the committee are the results of our Phase II study, which presents a complete economic and financial analysis of the core plan submitted by the Trustee.

What we have presented in this report is our independent assessment, utilizing the information provided to us by December 28th, as contained in the various notes of the Trustee's plan. And our own independent information, other sources of information available from the Interstate Commerce Commission and the Association of American Railroads.

We essentially analyzed two key cases. We did a detailed analysis of the core as presented in the Trustee's plan. We did find it necessary to make a number of corrections to make sure that all of the information was presented in a complete and final form. We completed an independent analysis to determine the economic return, what we call the internal rate of return, and we did a [12] loan repayment analysis based upon what we projected would be the

cash flow over the period of 1980 to 1986, in inflated dollars, which is the basis on which loans are essentially repaid. We did have to make some assumptions as to what the interest rates would be in the loan repayment period but we essentially tried to adhere to the assumptions that were incorporated in the Trustee's plan.

Peat, Marwick, Mitchell and its engineering sub-contractor TAD did an independent analysis of the various assumptions that are incorporated in the Trustee's core plan.

Now on Page X-8 we present our analysis of the Trustee's core which we have entitled The Adjusted Trustee's Core. We have applied our own independent assumptions with regards to various aspects of the operation, mechanical engineering and financing, car hire and other important topics.

We have presented in our report what we believe are the more reasonable and appropriate assumptions that should be used in carrying out an economic and financial analysis.

To essentially summarize the findings, it is our finding that the internal rate of return in loan repayment capability of the adjusted Trustee's core, using our independent assumptions, of operations and cost incurrence, [13] mechanical, engineering and freight car revenue point of view, we find that the internal rate of return and loan repayment capability are clearly unfavorable. We find that the internal rate of return from an economic sense is less than zero percent. We find from a loan repayment point of view there appears to be little opportunity to pay debt that would have to be incurred associated with start-up working capital, and a significant amount of rehabilitation that exceeds 115 million. That would have to be programmed over a period of five years.

When we carried out this analysis there was very extensive discussions with respect to the appropriate traffic projections. There were lengthy meetings and discussions

with the committee to arrive at a consensus opinion on the traffic projections, based upon the original work performed by the Rock Island regional sales managers. Our analysis of the adjusted Trustee's core applies that consensus opinion on traffic projections. There are a number of reasons why those projections tend to be on the optimistic side. There is uncertainty as to who the connecting carrier will be at Council Bluffs. It is pointed out in the analysis of the regional sales managers that if there is an unfriendly connection at Council Bluffs, then it does raise serious questions as to the retention of an important portion of the traffic at that gateway. [14] It is also the issue with regard to growth in the economy. In our projections of traffic we have used a compounded growth rate of 2 percent per annum with respect to traffic growth, beginning with the estimated retain traffic on the core system, and essentially assuming that the benefits of the growth in the economy will be achieved in the operation of the core.

We all know that during the last quarter of this year carloadings, naturally, declined 4 percent, where on the average for 1979 they did increase by more than 2 percent. It is projected by a number of sources that there will be a decline in carloadings during 1980, and again it raises the question with regards to the projections of traffic.

With these concerns in mind we analyzed two lower traffic cases to determine what the sensitivity of the economic and financial analysis would be for the core system. We presented additional cases which provide the calculation of the internal rate of return and the loan repayment capability for the core system. With these lower traffic cases we continue to have very little economic value with regards to the core system. The internal rate of return continues to be less than zero and the magnitude of the loans outstanding at the end of 1985 would continue to increase and would be in excess [15] of 250 million at that time.

Based on the evidence we have at hand, which is the information provided in the Trustee's plan filed on December 28th, and other independent information we have, it is our conclusion that we have presented an economic analysis and financial analysis based upon a reasonable and appropriate set of assumptions. The question was raised this morning as to whether if additional information was available would we, Peat, Marwick and our engineering consultant, TAD, we view that with the possibility of re-casting our study. And like all professionals in this field we remain prepared to review any additional information that might be available to us and to provide our own independent opinion.

THE COURT: Were you made aware of the nature of the additional information that was being discussed?

MR. HILL: There was essentially three additional items of information that were mentioned to us that might be made available in the future. There was a question with regards to the engineering costs. This is the cost associated with normalized maintenance and maintenance of way. It was pointed out to us that we might have a duplication in the manning tables that we incorporated in our adjusted assumptions. We are waiting to receive that additional information. We do not think, however, [16] that that information will have a material effect on our findings.

It was also pointed out to us that there may be additional information provided to us in connection with a future coal move that would commence in 1982. It is called the Muscatine Coal Move. We utilized, in terms of 1978 dollars, an estimate of 9 mills per ton mile. That was essentially the industry average that was experienced and documented in various studies, as an average coal rate that a railroad would receive for moving a ton mile. The Trustee, in his

plan, had estimated that rate to be 17 mills per ton mile. So we are awaiting further evidence to document while he believes the 17 mill rate for that particular coal move would be appropriate, where in fact it is considerably higher than the industry average that was experienced in 1978.

THE COURT: You did take the possibility of this coal move into contemplation in your study but at a lower rate?

MR. HILL: Yes, but at a lower rate, your Honor.

THE COURT: All right, go ahead.

MR. HILL: The third area has to do with the question of car hiring and car rental. As a result of reorganizing around the core, beginning in 1980, this year, there would be a significant surplus of cars. It is the Trustee's plan [17] that all of those surplus cars would be made available to foreign railroads. They would be leased on a favorable basis that would generate significant revenue for the core. We did a very detailed analysis of the assumptions with regards to the leasing of that surplus car fleet, and we did a detailed analysis of what the future incurred car leases would be on foreign cars used on-line by the core system. We have presented new information that was made available by the American Association of Railroads with regards to variation in the average number of car miles per car day. We have utilized that in our analysis as well as other independent assessments to arrive at a series of adjusted assumptions with regards to car hire and car rental. We wish to point out in the Trustee's core, in the developing of his report this information was not available and used an industry average of 59 car miles per car day. So based upon additional information that was available to us and based upon our own independent analysis and concern that every car day off-line might not necessarily earn the expected revenue, we did make adjustments in the assumptions with regard to these two particular items, and it

results in a change in the revenues that would be incurred from car leases and the expenses that would be incurred from car hire.

THE COURT: The anticipated revenue under your [18] assumptions would be smaller?

MR. HILL: It would be smaller, your Honor, and the car hire expenses would be larger.

THE COURT: This is not an instance where the Trustee suggested in the meeting today that he has still further information that you should consider but rather an instance where I assume that he disagrees with your assumptions?

MR. HILL: This morning essentially they said that they would like to have further time to study our report, which they received yesterday. They raised some questions about our assumptions. Your Honor, we essentially used two independent approaches ourselves, Peat, Marwick and TAD to arrive at an estimate. The more analytical approach that was used by TAD, based upon historical information, was the final estimate we used, which in our opinion is the appropriate estimate to use.

So, without further evidence available to us at this time we essentially stand by the findings and conclusions that we have presented on Page X-8.

THE COURT: Thank you, Mr. Hill.

* * *

[20] MR. MANOS: Your Honor, what I am suggesting is the following: Quite obviously it will be impossible to [21] address the matters that are contained in the PMM today. The Trustee's staff would like to review those matters. Not necessarily in an adversary sense, but in a sense of responding, for the Court's attention and the best interest of all the parties, responding to the PMM study so that everybody would have a complete picture. The Trustee's plan contains a core study. We believe now that the plan

should go to the Commission on February 5th, on or before, as the Court has decreed. If any modifications are suggested by the creditors that would be supportive of the PMM study. They should come to the Court. If there are any alternative plans which they wish to propose they should come to the Court. When all of these matters are filed with the Court, then the Trustee's plan, all of the alternate plans, suggestions and modifications, along with any other comments that the Court perhaps would wish to make to the Commission, should be transmitted at that time.

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[23] MR. BROADLEY: Your Honor, I suggest that we have come to the end of the road with the independent core railroad.

We began this process of selecting an independent consultant about a year ago, as I recall it was sometime in February, 1979. After a long series of twists and turns, Peat-Marwick commenced the analysis of what the Trustee identified as the core that was viable. We have a report by Peat-Marwick. The conclusion [24] that Peat-Marwick, the independent consultant reached, as set forth on Page X-8, in the last paragraph thereof. Let me recall that those conclusions are based on the most favorable traffic assumptions in which the core railroad would obtain the benefit of increased traffic through economics, and what we call the main traffic. Traffic which may be available if additional equipment is available. In addition the core had the benefit of a favorable connection at Council Bluffs, a friendly connection at Council Bluffs and the conclusion that the independent consultant reached was that that core with that favorable traffic assumption was not viable. Changing the traffic assumptions to less favorable cases makes the situation extremely bad.

The Trustee has submitted a plan of reorganization which is centered upon a core railroad operated by the reorganized, or a reorganized company. It is our position,

and I believe the creditors are also of this opinion, that in view of the conclusions reached by Peat-Marwick, it is a waste of everyone's time to refer this plan to the Interstate Commerce Commission, since there is a very fundamental defect in its underlying assumptions, that that is a viable core railroad which can be operated by the reorganized company.

I think we should all be aware of two very [25] significant dates that are coming up. The first date, and the last in time, is March 2nd, when the current directed service order expires. The earlier date is the 1st of February, when under the 401 process of the Federal Railroad Administration we should be getting very serious indications from potential purchasers of the various segments of the Rock Island. We believe the time has come or will come very shortly after February 1st when the parties in interest to this proceeding can start presenting or getting together a viable plan for the sale of the entire Rock Island Railroad. That a plan which recognizes that there is no viable core which can be operated by a reorganized company.

Let me back up and tell you what we are proposing. What we are proposing is that the Trustee withdraw his plan as fundamentally flawed. And that the Court direct the parties to submit by February 11th proposals for the sale of the entire Rock Island. By February 11th the Government and the creditors and the Trustee will have the benefit of the February 1st submissions. In other words, we will know who is interested, or if anyone is interested in, shall we say, the present packaging, and I think it is no secret that one of the present packages is the core. After February 1st we will know whether anyone is interested in that package. If no [26] one is interested in that package, repackaging might be necessary. And the Trustee suggests well, everyone file his plan. The creditors plan the file of liquidation, he has his plan of reorganization, and we send it all off to the Commission. If we have

no bidder for the core on February 1st, how are we going to repackage it. Are we going to repackage it and litigate before the Commission for however long the Commission proposes to take to decide itself whether the core is viable. We are suggesting that after February 1st if repackaging of the core becomes necessary it has to be done very quickly in order to make appropriate adjustments on March 2nd to insure that essential service in the core area continue. The nature of the adjustments, the nature of the provisions for continued service are going to depend very much on the nature of the interest expressd on February 1st. We don't think, at least the Government doesn't think, and I don't think even the creditors believe, that there will be anything but confusion and delay caused by submitting three, four or five competing plans, including the Trustee's plan, which contemplates a continued operation of the core by a reorganized company to the Interstate Commerce Commission. That is the formula for delay.

We urge the Trustee to withdraw his plan. The Government is willing to work with the present creditors' [27] committee to attempt to devise some guidelines for the structuring, or the sale of all of the assets or all of the real assets of the Rock Island, and if necessary repackaging the core. Thank you very much.

THE COURT: Mr. Broadley, I have a question or two that you might be able to help me with.

I am not at all confident that on March 1st, or whatever the date for bids is, that we are going to get anything meaningful.

MR. BROADLEY: February 1st, your Honor.

THE COURT: February 1st. If I were a railroad interested in some segment of the Rock Island, viewing the uncertainty of its future, the expiration of a directed service order on March 2nd, the very real prospect that the Commerce Commission means what it is apparently saying,

that the Railroad will cease operations on that date, or maybe embargo—I would sort of wait and see what would happen at a distress sale some time later rather than make a serious bid on an operating entity in a reasonable state of maintenance with the hope that I would get a better bargain. Without any experience in railroading, I would say that this is true in any similar situation. I wonder if it is not true that we aren't going to find that February 1st that we get anything very helpful by the way of bids.

[28] MR. BROADLEY: Your Honor, there are a lot of considerations that obviously are going to affect the potential acquiring of railroads, and I don't intend to be an expert in those considerations.

I think with respect to the non-core lines, whether they submit, shall we say, meaningful bid on February 1st, or wait to see what they can pick up later, is not really too significant from the point of view of the creditors of the Railroad. A large part of the non-core operation is already, at least tentatively, sold to the Southern Pacific. There has been some interest, certainly by the Southern Pacific, in at least an operating portion of the Sun Belt Line. The real problem, both for the public interest, and I suspect for the financial interest of the Estate is the core. I have got to admit, there is some concern that there may not be a meaningful bid for the core. I think to proceed with the Trustee's plan, which essentially is open—there is the option of keeping the core going as an entity for some railroad, six, seven, eight months down the line to pick up at a distress sale would be alleviated. The problem would be alleviated if we had the ability, the meaningful ability to repackage the core. I think anyone interested in bidding for the core has a couple of factors in his mind. First of all, it is in his interest to pick up a going [29] concern rather than something that has been shut down for two, three, four months. Second, he is going to analyze the alternatives. Now again I don't pretend to be able to see into the

minds of the various railroads that might be interested in acquiring the core. I think that one alternative is that the core be repackaged instead of being there, or sold as an entity. Real efforts be at least in the wings to sell line A, line B and line C separately, which may be more attractive to different carriers. That that possibility itself might have some influence on a potential acquirer of the entire core.

THE COURT: I recognize that that is possible.

My second question is, Mr. Manos suggested in his recent comments and my admittedly very fast scanning of the proposed plan suggest that it is not a plan which focuses exclusively upon the continued operation of the viable core, but it admits the possibility of the total liquidation. Therefore it serves already the purpose that you would suggest of my rejecting the core concept.

MR. BROADLEY: Your Honor, I have heard that from Mr. Manos and the Trustee on numerous occasions. I must confess I am not quite sure what they mean by it. The plan clearly contemplates a reorganization of the Rock Island around the core railroad. It doesn't contemplate the Trustee going to work tomorrow morning and putting [30] 100 percent of his efforts into selling the core. Or if no one is interested in the core, into the selling line from A to B. I think what we are talking about is really a very substantial, very meaningful difference in emphasis. That the plan, the heart of the plan is keeping the core as an independent railroad, reorganizing the company around it.

What we should be doing, what is in the interest of both the creditors and the public, is to pull all of the Trustee's efforts, all the efforts of the parties into disposing of these properties. The public interest requires that certain lines continue in operation. I would be less than candid if I didn't admit it. We are very interested that certain areas, particularly on the core, continue to be served. The credi-

tors are interested in maximizing their return, and I think one aspect of that is getting rid of the core as quickly as possible. Since there is a potential that they might incur some losses if the Trustee resumes operations. I will let them speak to that.

But given the real issue, it is the emphasis of the Trustee's effort, the emphasis of the Court's effort. Sending the present plan [of] reorganization to the Commission is counter-productive, we believe, both to the public interest and to the creditors' interest. We believe that [31] in view of the PMM report, the Trustee should voluntarily withdraw his plan and the Court order that the parties submit their proposals by a date reasonably far after February 1st, that we can submit a meaningful proposal based on the knowledge of what comes out on February 1st.

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 B 2697

In the Matter of:

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,
Debtor.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled matter before the HONORABLE FRANK J. MC GARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois on Friday the 25th day of January, 1980, at the hour of 2:00 o'clock.

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[56] MR. BROADLEY: In connection with preparing a proposed order I had a discussion with Mr. Rush yesterday about the position the Commission would likely take if your Honor entered an order directing the Trustee to withdraw this plan. Mr. Rush indicated that if your Honor entered such an order the Commission, in all likelihood, would not find it expedient, necessary or proper to appeal that decision on jurisdictional grounds. And the Commission has frequently expressed concern about the exercise of its primary jurisdiction. Mr. Rush's indication to me was that if your Honor finds that the plan has no merit and decides that you should order the Trustee to withdraw it, [57] that the Commission would acquiesce in that decision.

THE COURT: Which means they wouldn't appeal it, in fact, thank you.

• • •

[66] [MR. BROADLEY:] First, I would like to say that the Government subscribes in large part to the presentations made by Mr. Moritz and Mr. Murray. As I said on Wednes-

day, the Peat-Marwick report demonstrates that we have come to the end of the road. For this Court to refer the Trustee's plan, which as I think all parties have conceded, is a plan of reorganization around a viable core, notwithstanding Mr. Manos' assertions to the contrary, will be to do a [67] futile act. And it is our contention that Section 77 does not require the Court to do a futile act.

* * *

MR. BROADLEY: The second area I would like to address is what type of relief—what should the Court do now. I think, surprisingly, the Government and the creditors are in fairly good agreement. I think first we have to lay to rest the Trustee's viable core. The Court should enter an order directing the Trustee to withdraw his plan.

Secondly, we believe the Court should direct the Trustee to file, by no later than the end of February 8th, possibly February 11th, depending on the Trustee's schedule, a preliminary plan of liquidation which sets forth in fair detail those lines of the Rock Island for which the Trustee has received offers to purchase. And [68] some brief summary of the offers which he has received. Secondly, it should set forth those lines which have not been the subject of offers to purchase, but which the Trustee reasonably believes will be the subject of such offers within a fairly short period of time, or upon which negotiations are actively in progress.

Third, the Trustee should identify those lines of the Rock Island which have been the subject of offers to undertake voluntary operation after March 2nd. Having filed the plan of liquidation on February 8th, or the preliminary plan of liquidation, we think that at this stage of the proceedings to confuse what we do with the Railroad, with the rail assets, with how we pay the various claims against the Estate is going to unnecessarily complicate what is already a very complicated operation, the payment of various claims, whether the absolute priority rule requires that Mr. Moritz' clients be paid before my clients, can usefully

be deferred for some period of time. However, we think the Court should then set another hearing, fairly quickly after the Trustee has filed his preliminary plan. At that hearing we should consider what steps are to be taken to implement the Trustee's preliminary plan.

I would like to call to your Honor's attention that under the Milwaukee Road Restructuring Act, that the Court can set time limits for the I.C.C.'s consideration [69] of an abandonment. In fact the Court is not bound by the I.C.C.'s recommendation on abandonment. Though it must refer them, I believe, to the I.C.C. for consideration.

Secondly, the Court can set time limits for the I.C.C.'s consideration of proposed sales. There I believe the Court is bound by the I.C.C.'s decision on whether a proposed sale should be consummated.

Third, the Court should consider whether to permit operation over the lines of the Rock Island by prospective purchasers, which the MRRA gives this Court the authority to do.

What is the advantage of this filing a plan of liquidation quickly, identifying the sales, and letting people know that by the middle of February this Court is going to be giving the Trustee directions on how to proceed to implement it. It comes back to the point your Honor was making on Wednesday. Why should any prospective purchaser come to the front on February 1st.

Your Honor, the fire sale is now, and we have to bring it home to prospective purchasers of lines of the Rock Island that if they want to buy February 1st is the time to get their bid in, their best bid and to identify what they want and the terms under which they are willing to take it. The problem with sending the Trustee's plan to the Interstate Commerce Commission is that it leaves [70] open the prospect of the Trustee concentrating his efforts on the viable core rather than on concluding sales. It is a very

natural reluctance. If I were, for instance, in the Trustee's position, and arguing the Interstate Commerce Commission, that this core is viable, I find it very difficult to go out and aggressively negotiate sales of the various components of it. It is just not human nature to be able to go on the one hand to be aggressively arguing for something in which the Trustee apparently has a great deal of faith, and on the other hand negotiating sales which will completely frustrate any viable—any core which will be operated by a reorganized company. The advantage of moving ahead with the liquidation now is that it identifies those portions of the core which can be sold. It is quite possible that on February 1st we will find that no one wants to buy the whole core, yet that certain lines in the core which are essential, which are essential to the State of Iowa, essential to certain shippers, could well be the subject of interest, of offers by prospective purchasers.

On February 19 the I.C.C. has, I believe, requested the comments of interested parties on what to do about the impending March 2nd shutdown and possible continuation of the DSO. The I.C.C. would be in a much better position to assess what it is going to do with [71] respect to maintaining service on some lines of the Rock Island. I think it quite clear that the I.C.C. has no intention of maintaining service over the entire Rock Island. I think the clear import of the action that was taken in December is that the 90 days for the entire system is it. And that the creditors, the Estate, should be using this opportunity of identifying the lines that they can sell, going to the I.C.C. If you have a prospective purchaser who wants to voluntarily operate the line, fine. Let him take it over on March 3rd. Though I must point out that it is quite possible that there will be implementing problems with voluntary operations. I believe the Milwaukee is running into them right now with the labor unions.

With respect to other lines which the Trustee feels have a good possibility of being sold, and indeed which might

be the subject of offers, one could always argue to the Interstate Commerce Commission that in order to maintain essential service a DSO to the prospective purchaser might be in order. And the value to the Estate, the value to the creditors of selling operating lines as opposed to selling—as opposed to having lines which have rusted rails, is very great.

We hear a lot about liquidation values, scrap values and salvage values. I have had the unpleasant experience of being associated with a valuation case in [72] a special court. Salvage values and net liquidation values are very femoral things. When you start looking at what the word net means, what the deductions, what the costs are, what the over-the-fence values of the right-of-way in Iowa is—there is very often not a great deal there. So the creditors, the Estate, and certainly the public are much better off if we can identify what can be sold as a going concern as quickly as possible, put as much pressure as we possibly can on the prospective purchasers to come to the front on February 1st to identify what they want, how much they are willing to pay, whether they are interested in taking over voluntary operations, and on what conditions it will be operated voluntarily and getting the information before the Court as quickly as possible, and getting the information before the I.C.C. as quickly as possible so that as February comes to a close the I.C.C. can decide whether a case can be made for directed service, limited directed service on a few essential lines. I am afraid that sending this plan to the Commission is going to frustrate that identification of sales of lines within the core. It just does not, as I said, it is not human nature for the Trustee to be working on destroying the very system that he is arguing in favor of before the I.C.C. Thank you.

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[93] THE COURT: I think I have heard enough of what has probably been the best oral arguments I have had the

pleasure of listening to from the various attorneys involved in this case. I think I have heard enough, in addition to having studied enough of the proposed plan of reorganization and the viable core and the Peat-Marwick study to reach a conclusion which I intend to announce concerning the matters that have been debated here today.

Preliminarily, though I find it disappointing in this focus on whether I should substitute my judgment [94] for the Interstate Commerce Commission, and decline to forward a plan to them that the Commerce Commission is not represented here. I regret that fact and candidly don't quite understand it. They have been here on other occasions when their presence was much less helpful than it would be now.

Let me indulge in a little bit of reminiscence and history about the Rock Island since the fateful St. Patrick's Day when it first came to my attention.

I appointed as Trustee and attorney for the Trustee two gentlemen in whom I had a great deal of confidence and my confidence in them has never diminished, and I have over the years indulged their sincere hope and expectation of an income based reorganization of the Rock Island. I have admired the Trustee's resourceful effort to achieve this, and I think with the creditors I shared his frustration, when an extremely difficult winter, and rising fuel cost, and disappointing traffic statistics intervened to really doom those efforts and to bring us to a state of cashlessness which we faced some several weeks ago. I have always indulged the hope of what I think is probably the gist of what I expressed before the Senate Committee that Congress would see its obligation if the public interest were really to be served here, to address its attention to the Rock Island as it did to the [95] Eastern Railroads which were the result of Con-Rail to the passenger service, with the result of Amtrak, and to the recent action to the Milwaukee, with sufficient help to bring about what I think was what Mr. Gibbons once described as Farm-Rail, which I

thought was an excellent term to describe what I hoped we could achieve here. I watched the attempts of the Trustee and his counsel to sell off segments of the Rock Island, and have been disappointed, with one happy exception, there have been no tangible results from that acitivity [*sic*], despite strenuous efforts.

I pushed Mr. Manos, in terms of timetable, in the filing of a plan of reorganization to the point where when I saw him on the street and noted his declining weight I had a severe attack of conscience because I was afraid I was driving him into bad health. I have listened to the Trustee for years through his counsel argue that I authorize and continue to be patient with the attempts to bring about a cash-based reorganization, based upon my finding of reorganizability. Mr. Manos argues in an abundance of emotion today that I should not decide that issue in four hours. I have in fact thought of very little else for four years. It has been the basic issue that I have confronted and the issue which I have had to decide over and over again as circumstances changed.

The concept of liquidation of a railroad [96] means tremendous hardship, economic dislocation, the public interest has always been on the side of my hope of continued operation, if not in whole or at least in part of the Railroad. I have until now balanced the equities of the rights of the creditors against the public interest in favor of continuing operations. I have watched the Trustee do what I regard as a masterful job but it has not succeeded because success was not possible as somebody argued today, except under a set of perfect economic and social circumstances, and life being what it is that perfect set of circumstances never came to pass.

I have had an opportunity to go over the plan of reorganization. It is not a liquidation plan. It is a plan for reorganization of a proposed viable core. Liquidation is there only as an alternative possibility, as the creditors have

argued, and the details of a plan of liquidation might be quite different than the details of a plan of reorganization, particularly in the area of priority and creditors' rights. So we have a basic reorganization plan which acknowledges the possibility of liquidation but is not a liquidation plan.

We went through a lot of travail, all of us, spent a lot of hours, missed a lot of dinner dates in constructing the framework for the final appointment of a Court's witness to determine the possibility of [97] reorganizability. And we wound it up in the unusual position of having, because of the intervention of cashlessness, having to force the filing of a plan of reorganization at about the same time as we were completing a study as to the potential of reorganizability so that the plan and the Court's witness study reached me at approximately the same time.

I have studied the plan of reorganization, as I said, and I have studied the Peat-Marwick report, my own witness. I am satisfied that the witness that the parties recommended to me and whom I chose has done a fine job. It is a good study and I am compelled to accept its conclusions. This being so I am compelled also, if logic prevails, to accept the conclusion that the plan of reorganization proposed by the Trustee has no hope of success.

The Trustee is therefore instructed not to forward the plan of reorganization to the Commission. The Trustee is instructed to continue his present plans for cessation of operations by the time of the anticipated termination of the directed service order with the hope that that might be extended, and the Trustee is instructed to prepare and file with the Court a preliminary plan of liquidation by a date which I will let him pick since only he can tell me how much time he thinks is necessary for [98] him to do that.

Before I finalize that order I would like to say that this ruling, in my judgment, means only that the final and inevitable decision that I have just made will have little

effect on the public interest. It does now what would inevitably be done in a matter of a few months and it starts now rather than later the process of private sale and Commerce Commission reorganization of railroad service in order to patch together the best possible compromise between the public interests and the creditors' interests. And I guess it finalizes what will be the last chapter in the long and regrettably sad history of the Rock Island.

That will be the order based on the motion made today, and I would ask Mr. Manos, if you care to comment now or wish to reflect on it how much time you think it would take to prepare a liquidation plan which will be a modification I would guess of your reorganization.

* * *

[100] THE COURT: There comes a time in any course of events when the end is inevitable. The creditors would insist that I am long overdue in recognizing that fact. Be that true or not I do recognize it now. I think the possibility of a continuation of the Rock Island on an income producing basis, whether in core or in whole or in part, I must inevitably conclude is just not possible and that is the basis of my decision. I must say that that decision was finally reached, or I was forced to it by a combination of the PMM study, my own witness, and I think a good one, and the arguments that I listened to today.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 B 2697

In the Matter of:

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,
Debtor.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the HONORABLE FRANK J. MC GARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Monday, April 14, 1980, at the hour of 2:00 o'clock P.M.

[4] MR. MANOS: Your Honor, there is an application, which has been drafted and, jointly, is being presented by the Trustee and the creditors representing the indentured trusts, as well as the Crown interests. And we believe it is a perfunctory application that already has been decided with reference to the discontinuance of all operations over the entire Rock Island system, and a mere confirmation of the Court's previous orders with respect to that matter, but the petition, as presented to the Court, by reason of Mr. Rush's statements, that were made to this Court on one of the previous status report occasions joined in by Mr. Rush in stating that unless, under the Milwaukee Restructuring Act, there is a pronouncement or a report of the Commission to the Court—this being an advisory report—that they considered, at least, that the Rock Island still had common carrier obligations.

For that reason, and in order to present a housekeeping —what I characterize as a housekeeping petition, we do present this to the Court at the present time.

We are asking that the Commission—since this would appear to be a very simple and perfunctory application—report back to the Court within fifteen days from the date of the filing of a limited application [5] or reduced-in-size application, by reason of our known circumstances to the Commission, and that the matter be heard at this particular hearing, which we recommend be somewhere approximately twenty to twenty-five days down the road from this date.

I believe that the Trustee would need approximately five or six days in which to prepare the application. We believe that the Commission should respond, by way of an advisory report, to the Court, as required under the Milwaukee Restructuring Act, within fifteen days. And we believe that, shortly thereafter, the Court should set the hearing for its decision, as required under Section 17 of the Milwaukee Restructuring Act.

Is there anything that the creditors wish to add?

THE COURT: Mr. Broadley and Mr. Rush are here.

Perhaps, Mr. Murray, if you want to say amything [*sic*] first, you may go ahead.

MR. MURRAY: Your Honor, this petition is being presented to the Court at this time, because of some of the concerns that were expressed by Mr. Broadley and Mr. Rush at an earlier status report.

I think I can speak for the other creditors, as well, when I say that we do not concede, that an order is necessary from the Interstate Commerce Commission in [6] order to end the common carrier obligations of the Rock Island. The fact of the matter is, that within the last year three events have intervened that have really necessitated the cessation of operation by the Rock Island.

In the first instance, the Rock Island was affected by the strike, which shut down most of its operations. That was

followed by an order of cessation of operations and a directed service order by the Interstate Commerce Commission, because the Commission found that the Rock Island was cashless. And, as recently as last week, the Commission confirmed the cashlessness of the Rock Island in an order that it served in connection with temporary operating authority. Thirdly, your Honor issued an order on January 25, 1980, indicating that the Rock Island could not be reorganized under any circumstances.

We believe that the cummulative effect of these three events totally absolve the Rock Island from any common carrier obligation.

However, to avoid any question in anybody's mind about the common carrier obligations of the Rock Island, we have presented this petition to your Honor.

We join in Mr. Manos' request that a date be set for a hearing under Section 17 of the Milwaukee [7] Railroad Restructuring Act.

We would, respectfully, suggest that the Trustee be given five days in which to prepare an application for abandonment; that the Commission be given fifteen days thereafter, within which to return to your Honor a report with its recommendations on this abandonment; and, finally, that a hearing be set, twenty to twenty-five days from today, to be preceded by notice, in accordance with Section 17(a) of the Milwaukee Railroad Restructuring Act, and the relevant provision of the Bankruptcy Act. All of these are set forth in the motion, your Honor.

So we would respectfully suggest that your Honor grant the petition. We do not believe that the petition is absolutely necessary, but in order to avoid any question in this particular circumstance, and to advance these proceedings along, we have presented the motion today to your Honor.

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[8] MR. RUSH: First, let me say that I think the Trustee and the creditors are on the right track, finally.

Secondly, I think it is important to note—and I trust it was a slip-of-the-tongue from my friend, Mr. Murray, although he is normally very careful about these things—the Commission's order in September was not an order to cease operations. We did enter a directed service order, because of the apparent inability of the Rock Island to continue to fulfil [*sic*] its common carrier responsibilities.

Finally, with respect to your Honor's order of January 25, 1980, that liquidation should commence, I would simply note that the New Haven case and the more recent decisions of the Special Court under the Regional Railroad Reorganization Act make it clear, we submit, that even once this determination is arrived at, appropriate authority from either the Commission or state regulatory authorities to abandon is, nonetheless, required.

So that we are back where we were, but for the fact that I do agree that it is proper to proceed in the manner which the Trustee and the creditors intend to proceed. With an exception—which I have difficulty [9] in addressing, because, quite frankly, Mr. Manos and I discussed this for the first time a little before noon—I was handed the petition as I sat at the table, so I am not in a position to advise your Honor as to the amount of time the Commission would deem necessary to render a meaningful advisory report to this Court.

I will say that we have been able to report to Judge McMillen, in the Milwaukee case, on a schedule of 120 days from the date of filing. Whether it could be done more rapidly in this case, I am not prepared to advise the Court at this time. But if it is possible, I would urge the Court to hold, at least, the scheduling order in connection with this petition, open until such time as we have been able to make a determination as to how rapidly the Commission can possibly handle an application and report back to you.

I believe that is all I have to say with respect to that.

THE COURT: Fine.

Mr. Broadley, I assume you have nothing to add to that?

MR. BROADLEY: No.

THE COURT: Mr. Manos?

MR. MANOS: Your Honor, just by way of response to Mr. Rush, on the one procedural aspect of 120 days in the [10] Milwaukee case versus the fifteen that is being suggested in the petition before the Court, I perceive that the Milwaukee case is really comparing apples and oranges. In this case, particularly, there is absolutely no operation that is being conducted by the Rock Island; there is no core operation, before the Commission, on a plan. The history of that is extremely well known to everybody—and the participation of the Commission and the F.R.A.—with respect to that particular matter. The liquidation is proceeding. And the Trustee has neither the rolling stock nor the employees, I might add, with which to conduct an operation.

So that I fail to see why an advisory report of this nature would require more than just a few hours to handle.

In the Milwaukee case, by way of comparison, we have a completely different matter. We have a plan before the Commission that deals with an operating railroad with seriatum [*sic*] considerations of abandonment in particular segments of the railroad. We don't have this here. Here we have a total system that has now ground to an absolute halt.

All we are asking is a confirmation from the Commission of its findings already entered to the effect that any reinstitution of this service, because of the [11] present circumstances of the Rock Island is considered to be impossible.

And also, with respect to Section 17, the Court has the authority to set the time frame. We believe that the time frame should be very short, so that everybody knows that there is absolutely no question in anybody's mind, either at any agency-level or shipper-level or creditor-level, that the Rock Island has been put to rest, as far as an operating carrier. So, your Honor, I would say that the schedule should be extremely brief.

The application to the Commission is going to be very limited. We will try to follow the rules, as established by the Commission, with, however, the suggestion of the Court that these be limited, because of the present circumstances of the Rock Island. We are not dealing with a segment-by-segment, seriatim abandonment approach. I know that there have been some seriatim abandonment orders entered by the Commission. Those have been furnished by the Trustee and, I believe, delivered to the Court. I suspect, in the next few days, that the Trustee and the creditors will look at those and we expect that those also will be presented to the Court, to be consolidated with the ultimate disposition by the Court on the total cessation and the total abandonment.

[12] For that reason, I am asking that the Trustee, and all of the parties in interest, be advised by order of this Court, very early on, as to where we stand with respect to the common carrier obligations.

MR. MURRAY: Your Honor, may I further respond?

THE COURT: Yes, Mr. Murray.

MR. MURRAY: Your Honor, we would join in Mr. Manos' comments. We fail to understand why the Commission would need 120 days to address an issue that is very simple and very cleanly presented to it.

On January 25th, your Honor ordered that the Rock Island should commence planning for liquidation. Prior to

that time, the Interstate Commerce Commission, itself, found that the Trustee was unable to continue its rail service obligations, and it was in that connection that it entered the directed service order. So it, itself, has already had most of the issues that this presents before it.

This is a very simple matter. And the Commission has had, since January 25th—and actually, since November of last year or October of last year—to consider the problems of the Rock Island as they are presented in their present acute form.

It is essential that all doubt on this question be resolved immediately, because we already have [13] lines of the Rock Island over which service has terminated, as a result of the expiration of the directed service order to the Kansas City Terminal Corporation. There is no temporary operating authority over some lines of the Rock Island, so if there is any doubt as to this matter, at all—and I submit that there can be no doubt as to it—but if there is any doubt in this matter, then the Commission ought to address the Court very promptly with that concern.

So we fail to see why there is a need to take 120 days or really any substantial period of time beyond the schedule that we have recommended to consider what is a very slean [*sic*] and simple issue, that can be addressed by the Commission very quickly. All we are talking about is a finding by the Commission that the Rock Island no longer has a common carrier obligation. Very simple form of abandonment petition.

THE COURT: Well, the Rock Island situation, of course is —and in its extremest posture over the last several months —has been well known to all of us. And the problems are of long standing. The cessation of operations, the cashlessness decision was originally initiated by the I.C.C. and the F.[R.A.], who joined in the—together brought about the directed service order and urged me to declare the cash-

lessness position, at a time [14] when it was apparent that that was the factual situation.

I am concerned that undue delay will delay the liquidation process, which is in process now, and which I want to continue without any abatement.

I will order the Rock Island to file its petition with the Commission within ten days and the Commission to give me its advisory response within thirty days. I think, under the circumstances, that is appropriate and reasonable. And I am sure the Commission can do it.

Then, I assume, we should set a date for hearing on that. I don't think it will be so cut-and-dry that the parties won't want to speak on the subject. It may well turn out that way, but in an abundance of caution, let's set a hearing on it.

MR. MANOS: Your Honor, does the thirty-day clock on the Commission begin as of today's order?

THE COURT: No, it begins after your petition, so they have forty days, in effect.

Mr. MANOS. From today?

THE COURT: Yes.

MR. MANOS: Thank you.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 B 2697

In the Matter of:

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,
Debtor.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled matter before the HONORABLE FRANK J. McGARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Monday the 2nd day of June, 1980, at the hour of 2:30 o'clock p.m.

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[2] THE COURT: There's a motion to confirm the discontinuance of operations, which I hastily entered and continued to June the 2nd in order to give the Commerce Commission time to file its report on that subject.

MR. MANOS: That's correct, your Honor.

THE COURT: I agree that that's a matter of number one priority, so let's address ourselves to that and that only for the time being.

MR. MANOS: There is no need for me to recite matters that have taken place for some years in the Rock Island proceeding. These are matters of record before the Court. [3] If any evidence is required alluding to the record of the five years of the operation of the Rock Island, I might say the valiant efforts of this Estate to reorganize on an income basis can be examined.

On April the 14th, as a consequence of the previous cashlessness, the financial condition of the Rock Island, the strike, and all of the other matters that preceded the cash-

lessness and the finding of cashlessness by the Commission, the Trustee, in conjunction with the creditors of the Estate, the indentured trustees and the Henry Crown interests, filed a motion in which they asked the Court for a confirmation that indeed the total line and the total system of the Rock Island was abandoned, that there were no further common carrier obligations and that all operations are ceased and terminated forever more.

The Court then ordered the Trustee to file an application with the Commission for its advisory report relative to confirmation of this, a confirmation of the abandonment, confirmation of the cessation of the common carrier obligations, and asked the Commission to render its advisory report as prescribed, or as described under Section 17 of the Milwaukee Restructuring Act within 30 days, which the Commission has done. The Commission reported before your Honor and essentially the Commission [4] has confirmed that indeed there must be a total abandonment of the Rock Island System, and that there is and has been for some time total cessation of the services of the Rock Island, but recommending to the Court that certain portions of the system, as outlined in he Appendix D, be withheld for a reasonable period of time pending a possible sale or conclusion of successful negotiations with the Trustee to acquire those points and segments.

Many shippers filed their comments with the Commission, many state agencies, the FRA filed their comments, additional comments were filed with the Court, as the Court is aware. The RLEA has filed comments with the Court in a brief which bears on the matters before the Court this afternoon and on the question and the issue of whether labor production [*sic*] is something that this Court should impose upon the Estate as prescribed under Section 17 of the Milwaukee Restructuring Act.

Comments were also filed by your Trustee and by the creditors in relation to the very same matters, in relation

to the matters contained in the abandonment application and the hearing today relative to the abandonment and also on the issue of whether the labor protection is a burden that must be imposed upon this estate.

As a consequence, there is a condition of the total line abandonment and the total cessation of the [5] operations of the Rock Island.

So, your Honor has before you not only the report of the Commission, which incidentally conducted its proceedings and heard all of the parties in interest who wanted to be heard, but your Honor also has the comments of other responsible parties, employee representatives, shippers and other people present here today who are parties in interest that may desire to be heard.

As far as the Trustee is concerned, and, incidentally, in this position he is joined with unanimity by all of the creditors, the time has now come for this Court to confirm by its written order that indeed the abandonment has taken place, de facto has taken place for some time, since January 25th of 1980 and originally from September the 26th of 1979, when cashlessness was first acquired by the Commission and all of the operations were taken out of the hands of the Trustee, and that the cessation of operations now, coupled with the liquidation, essentially all of the assets of the Rock Island that are critical to any kind of an operation, all of the cars are gone, essentially, and you've got to have cars, you've got to have track and you've got to have employees. We've got track, it's in bad condition, but we don't have cars any more, your Honor, as of the day of the strike when that occurred back in August, we didn't have any employees [6] and, your Honor, we don't have any now, so that all of the elements exist for the entry of an order here today for the entry of an order of abandonment and a decree of abandonment confirming that these acts have taken place for some time, that the Rock Island no longer has any common carrier obligations

and since it does equitably, constitutionally and by precedent, there is no labor protection to be imposed as a condition upon this estate, because when an industry, an industry such as that of the Rock Island used to be in the common carrier business, when there is no business to be conducted, when there is no essential national policy that relates to the imposition of any labor protection against the estate after it is expired, the operation is gone, and then this Court must, in the opinion of the Trustee, and also shared by the creditors, there must be a decree of abandonment and no labor protection.

Thankfully, some of the employees have found, under what is termed now as the Miami Accord, employment with other railroads, so that the public interest there is served now, thank God. The other employees who are not so hired have other avenues of compensation. Hopefully they can find other jobs, and if they can't, they have the right to unemployment compensation status. But, as far as this Estate is [7] concerned, this Estate already has the burden of its creditors that are unpaid, your Honor knows that there are many, many millions of dollars of unpaid costs of administration that must be paid here as a priority, and for five years the creditors have stood by, with objections, not stood by without objections, but with objections, and have watched the public interest, in conjunction with the operation, consume this Estate to a degree now where constitutionally it's mandated that not only the system be abandoned, but that there be no labor protection and that a finish be written to the common carrier known as the Chicago, Rock Island and that a distribution be made of its assets to the extent that such can be made to its creditors.

Your Honor, I wish to make one reference as far as Section 77 is concerned, and whether this Court, in the exercise of its great patience over the five-year period, has fully discharged its duty and fiduciary duty that the Trus-

tee has discharged in order to bring about, if possible, an income based reorganization. The most recent history, as your Honor is aware, is that there was, pursuant to the Court's direction, filed a plan of reorganization that embodied a continued operation, a core. History is also replete and the record is replete with the fact that little support was received from the [8] public interest for this core. Nobody sprang forward to support at the time when it should have been supported, your Honor, a continued operation by the Rock Island, and perhaps this occurred because everybody was of the opinion that the Rock Island had arrived at a point on January 25th of 1980 where liquidation was the only solution.

In all events, the Trustee and the Court gave everybody the opportunity to spring forward, if the public interest so demanded, to support a core. No such support came.

As I stand here, your Honor, I feel that the Court order of January 25th in which liquidation planning was commenced and the plan was not sent to the Commission, was dictated by all of the happenings, the financial condition of the Rock Island, the failure of the public interest over the period of four or five years to fully support the track rehabilitation and other matters that might have brought about a successful reorganization, but all that is history.

We're here now where abandonment is required. The Commission advised the Court that it must occur. The Commission has advised the Court that operations are impossible.

Now, as far as labor protection, there [9] can be no labor protection against an estate that equitably cannot bear the burden, constitutionally should not be made to bear it, and by precedent established by the Commission, should not be made to bear it. Accordingly, your Honor, there is being submitted to your Honor this afternoon an order encompassing all of the matters that I have set forth in decree-

ing the abandonment, total cessation of operations, and also dealing with the matter of labor protection, that it's no longer an issue or burden on this Estate, but decreeing that there shall be no claim which shall be paid out of this estate, or funds to be borrowed for that purpose, for labor protection, since there is no requirement under Section 17 of the Milwaukee Restructuring Act that this occur as a condition of the total abandonment and the discontinuance of service.

Your Honor, may the record show that I present to the Court the order, which is being presented, a draft order which is being presented with the full knowledge, the acquiescence and unanimous support of the indentured trustee and the interests represented by Mr. Bert Jenner of Jenner & Block. It embodies essentially the findings, as I have described them to the Court, relative to the cashlessness, the inability of the Rock Island to reorganize and to operate, and also adopts the recommendation of the Interstate Commerce Commission that [10] for a reasonable period there be withheld those portions of the line that may have some reasonable expectations of sales to other rail carriers, and this reasonable period, your Honor, we recommend to the Court, be six months, a period of six months, the Trustee will in good faith negotiate with those carriers or other entities that wish to purchase portions of the Rock Island in good faith.

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[17] [Mr. CLARKE:] Now, the other point that comes up in this is the question of employees. We would submit, your Honor, that the I.C.C. consideration of employees can be considered nothing more than advisory at best. It said on one hand it is apparent that 17(a) requires protection. On the other hand, it said that there's another viable alternative to the core. We, of course, disagree that there is any viable alternative to 17(a), which we submit is mandatory and clear on its face, But, even so, before this Court can really get down to the whole question of employees and the

extent of the protection needed, the Court has to have a chance to look at the present structure of the employees, where their seniority is, how many are still left, what are the chances for those employees as a body [18] or as individuals getting employment on other carriers. The I.C.C. attached a report from the F.R.A. as one of its appendices to the report, which shows that a substantial percentage, 60-some-odd percent, I believe, of Rock Island employees would be offered employment by other carriers. We submit, your Honor, that the facts will show that that is not true, that has just not come to pass, that was an analysis of the situation in the best possible position back in January and February of 1980, which recent events, even under the March 4 hiring agreement have shown this as not happening. There are hundreds and thousands of Rock Island employees, their families and their communities, that can be without a source of income as a result of this entire line abandonment, and we submit that not only does 17(a), but also the public interest considerations of any reorganization under Section 77 requires this Court to consider those factors in making any decision on this matter.

Finally, I would submit, your Honor, or point out that we submit that 17(a), as indicated, is mandatory. The I.C.C. said that there was a viable alternative in a sense of no abandonment protection because of its prior practice in certain cases, namely North Hampton & Bath and the Wellesville case. There was also the most recent one cited by the Trustee in the order [19] which was just submitted to the Court. All of those cases are shortline railroads. In one in North Hampton & Bath, the company which owned it, the parent company, had a pension plan, which gave if not greater at least as equal as in the case that the New York dock [*sic*] conditions would impose. The Wellesville and Madison case was an extremely small railroad, and there was not the large public interest effect that you would have by an abandonment of this sort. In this case, there is a specific statute on point, namely 17(a), which displaces any

kind of precedent value that the Tennessee Central case might have had, again another shortline case. But, the thing that we submit has to be remembered in passing upon the precedent that is cited as support for the position that there is no labor protection, or employee protection, is the fact that the doctrine developed at a time when the I.C.C. had discretion to impose or not impose protections for employees in abandonment cases. In 1976, when the 4-R Act was passed, that discretion was taken away, and Congress said that no certificate of abandonment may be issued unless the Commission imposes protection for employees of a certain level of quality. The North Hampton & Bath and the Wellesville case were, of course, decided under that new statute. However, they were not—there were no petitions for reviews in those cases to the Appellate Court to test [20] out the I.C.C.'s stance on that one point, simply because of the limited effect on employees. The issue, as we submit before this Court for the first time in a sense in a judicial review in that way, but again it's not really before the Court, because of 17(a), which says it's mandatory, and in the Milwaukee case, even though the creditors in that case, in the Milwaukee reorganization, had argued that eventually there would be an entire line abandonment. The Court said it doesn't matter, 17(a)—5(a) in that place, which was comparable to 17(a), it's clear on its face and has no exceptions, and it caused deferred payments to take up what would happen later on as a result of whether or not the protection should be continued or should be given priority status.

But, your Honor, the main fact is, we submit, that 17(a) is clear. There is also one other point that should be addressed at this time, and that is Mr. Manos' statement, or in fact the proposed order has the finding that the recent Congressional Act would have no application to this case. Congress on Tuesday, I believe, or Thursday of last week, passed on to the President on Friday an act, the Rock Island Transition Act, which requires protection for

employees, set up a $75 million fund and required that that fund be granted status of an extensive administration and paid immediately.

[21] THE COURT: Where is that fund to come from?

MR. CLARKE: That fund is to come from loan guaranties by the Federal Government, but eventually it becomes an obliagtion of the Estate. In fact, it is an obligation of the Estate.

But the Congress, in a sense, said that this is the way it is to be. It directed the Trustee and the labor organizations to within 10 days agree to a plan which is identical to the Milwaukee Section 9 agreement. If the Trustee and labor do not agree within 10 days, the I.C.C. was to impose it within 20 more days, and that imposition by the I.C.C. was to be in effect. There's no discretion to anybody on this except for the Trustee to decide whether to agree or not. That's it, it's there, and Congress has said it should be in place on any disposition of the Rock Island and the Rock Island Estate. But, that is an elective type of benefit to the employees, and it's up to the employees to determine if they want to take that benefit or the benefits of 17(a), whichever in their mind is considered more beneficial to them.

We would submit, your Honor, that it's a matter of statute, it's a matter of law which we submit under the precedent, and the prior decisions, is not only constitutional, but required to be followed in this case.

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[42] [MR. MURRAY:] We strongly oppose the imposition of any labor protection conditions on the Rock Island Estate. I must say when I heard the representative of the RLEA, the Railway Executives' Association claim the mantle of a creditor, I was somewhat bemused. We had the Missouri Pacific here earlier in these proceedings claiming that particular status, but, as everybody

knows, they have a distinct interest in the situation and it is quite different from the interest of the creditors. It [*sic*] don't propose with respect to labor protection questions to repeat all of the legal arguments contained in the comments we filed with your Honor. I believe we have ample citation of cases contained in those comments supporting our position that there should be no labor protection. I think that the legislative history that is described in those comments is quite clear, that Section 17(a) intended no change in the law with respect to labor protection, and I think the cases that were cited in those comments makes it clear that no change in the law was intended, and in fact, it seems that the Brooks-Scanlon line of cases makes clear that we are [43] entitled, and were entitled some months ago, to cease operations without the imposition of any conditions because of the massive losses that had been incurred by the Rock Island.

In the comments that were submitted to the Court, the Railway Labor Executives' Association has requested the Court to oppose the conditions promulgated in New York dock, which is at 360 I.C.C. 60. Those conditions, I think it's fair to say, would cost the Rock Island Estate hundreds of millions of dollars, and indeed, if those conditions were imposed on the Rock Island Estate, it might well mean that we would all go home and simply turn over the Railroad and its assets to the labor unions, because there would be nothing left for anyone else.

I concede that labor protection, your Honor, has an emotional appeal to all of us, because we all share sympathy for the many workers who have dedicated themselves to the Rock Island over the years and who now find themselves out of a job. But, I think if we review the history of these proceedings very briefly, we will see why labor protection cannot be imposed, not simply as a matter of law, but also on equitable grounds and as a matter of sound economic policy.

The Rock Island filed its petition for [44] reorganization five years ago and the creditors, from the very inception of these proceedings, argued that the Rock Island could not be successfully reorganized. The Trustee made a valiant attempt, but the Estate suffered losses well in excess of $150 million. So really, for a period of four and one-half years, the jobs of Rock Island employees were preserved and protected at the expense of the creditors and shareholders of the Rock Island in an amount well in excess of $150 million.

The Trustee sought to schieve [*sic*] a successful reorganization and really critical to the success of his efforts was an attempt to improve productivity, efficiency at the Rock Island, and that required extensive work rules changes on the part of Rock Island employees. I will concede that there were a few changes that were achieved, but I think everybody would agree that for the most part, those changes were relatively minor and had an insignificant impact on the Rock Island operations. In fact, everytime the Trustee thought to make dramatic productivity improvements, work rules changes that could have made the difference in achieving a successful reorganization of the Rock Island, he was met with resounding rebuffs from the labor organizations representing Rock Island employees. I believe that the successful refusal of railroad labor leaders even to entertain significant work rules changes [45] insured the death of the Rock Island from the first day of these proceedings.

In the summer of 1979, following two devastating winters, the Trustee found himself in a desperate cash position. In fact, that fact was well known to railroad labor leadership, and yet despite the critical cash position of the Trustee on August 28th, 1979, labor leaders called a strike against the Rock Island because the Trustee refused to bow to their demands for retroactive wage increases that were not accompanied concurrently by modest work rules changes and attendant productivity gains. So, on Septem-

ber 20th of that year, the President of the United States appointed an emergency board, pursuant to Section 10 of the Railway Labor Act, thereby mandating a return to work by the employees of the Rock Island. Railway labor leaders defied the Presidential Order and the clear requirements of the Railway Labor Act and they refused to order their members back to work. As a result, the Trustee's cash reserves were completely depleted, and on September 26th, 1979, the Interstate Commerce Commission found the Rock Island cashless, rendering its continued operations impossible, and it ordered directed service. But, even after the entry of a directed service order by the I.C.C., the union leadership refused to order their members back to work until the I.C.C. agreed [46] that all employees of the Rock Island would be called back under the directed service order, even though they might not be needed at the outset. Thus, directed service was much more expensive to the Government than it had to be because of the labor leadership insistence upon employment of all personnel, even though they were not needed.

So, during the ensuing six months of directed service, the jobs of Rock Island employees continued to be protected at a cost to the Government of over $70 million or $80 million. So, since the inception of these reorganization proceedings, the employees of the Rock Island, whose leaders have resisted the productivity gains essential to a successful reorganization, have received five years of job protection, at least five years, at an expense of more than $150 million to the creditors and shareholders of the Rock Island, and an expense of $70 million to the Government and to the taxpayers of this country.

Your Honor, I have said earlier that we have great sympathy for the many loyal and dedicated employees of the Rock Island who are now out of work, and we do. But, we have no sympathy for the leadership to which these workers—the leadership of the unions to which these workers belong, because they did not cooperate in helping to make

these reorganization proceedings [47] successful, and we do not believe as a matter of sound public policy, as well as a matter of law, that they should be rewarded for their intransigeance.

Your Honor, I urge the adoption of the I.C.C.'s recommendations in the format and according to the program that the draft order we have submitted describes, and I specifically urge the rejection of any labor protection conditions.

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THE COURT: Mr. Broadley.

MR. BROADLEY: May it please the Court, I'm John Broadley from the Department of Justice, herein here today [55] for the Department of Transportation.

First, let me say that the Department of Transportation endorses the recommendations of the I.C.C. report, and the only reason that I have a few words to say today other than that is the draft order, the proposed order that was submitted by the Trustee and the creditors. In particular, we have very serious problems with Paragraph 4 of that order, which we believe seriously misreads the constitutional law on the subject. Accordingly, our basic request with respect to this matter is that we be given a few days to file a memorandum setting forth the deficiencies of the proposition espoused in that paragraph.

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[61] [THE COURT:] What we're about today is really a hearing on an earlier made motion to confirm the discontinuation of the railroad operations of the Rock Island. It was continued until today to await the I.C.C. report and recommendations on the subject, which we now have, and I commend the I.C.C. for doing such a fine report in such short time, so give the various creditors an opportunity to express their views, as they have, the various states and other interested private parties

to express their view, which they have. I've heard a lot and I intend to rule on that motion, and I intend these remarks to be my ruling and an explanation of whatever order I ultimately sign, and since I'm in a sense shooting from the hip in a very complicated matter, I apologize if the observations are not as tidy or as well structured as they might otherwise be.

Preliminarily, let me say that I have had many expressions of what might be called the public interest side of this case in the form of letters, telegrams, communications of all kinds. I had a letter from a governor handed to me today, I have another telegram from a governor of another one of the effected states. These are things that no Court ignores, because I am as sensitive to the public interest as I suppose anyone else in the proceeding. I'm sure the creditors would be willing to sign affidavits [62] that they think I have been over zealous in protecting the public interest by letting the Rock Island operate as long as I did. But, the public interest has been my concern for five years and it's my concern now.

On the other hand, this is a bankrupt business, and private creditors cannot forever support the on-going operations at a loss, of a railroad in service of the public interest, and the time when those operations have to cease, because of the rights of the creditors, is a time which has come and a time which has passed.

So, as to the current on-going operations of segments of the Rock Island Railroad, I want to make sure the record is clear that despite the fact that I agree completely with what the Commerce Commission has done by way of directed service, the current operations are not my doing, they are the result of directed service orders or other carriers operating under leases pending negotiation for sale. This is in the public interest. I'm glad that it's happening, but the Rock Island is operating nothing, and it hasn't been operating anything for some considerable time,

because it has been my decision, and continues to be, that the continued operation of the Rock Island has passed that point where it is mandated by the public interest and is such a serious financial disservice to the creditors that it was terminated and had to be terminated.

[63] Now, this affects a lot of people, and the unhappy effect upon the economy, upon labor, upon those private businesses which rely on the sevices of the Rock Island are very, very regrettable. I suppose it's true, as true in any other industry as in the automobile industry today, when an employer reduces operations or ceases operations, there is a serious public impact. But, it's a public impact which, however regrettable, can no longer be the subject of any further concern on the part of the Court. I have tried to explain that my concern has dictated very much many of the orders I've entered in this case over the years, but that public interest can no longer be a dominent factor in consideration of the future of the Rock Island.

Another way of saying it is that the Commerce Commission, which is charged more heavily with the public interest than I, has studied this situation and has, in effect, done whatever could be done for the public interest in the present posture of the Rock Island and has made various recommendations to the Court, which I have received.

We come to the question of the interest of labor. Once again, a most regrettable situation that people lose their jobs because a business stops. But, as to the suggestion that Section 17 of the Milwaukee Restructuring Act mandate labor protection in the Rock [64] Island case, this is a suggestion which I must reject for reasons which I will comment upon in a little greater detail later. I do not read in Section 17 of that Act any applicability to the Rock Island case and the total abandonment, systemwide abandonment of a railroad.

What the new Rock Island lesiglation [*sic*] signed by the President mandates remains to be determined, and I'm not commenting on that now.

Another avenue of very great interest, a form of the public interest, has been expressed by the attorneys from Iowa and Kansas and Texas, and their argument is that I should postpone abandonment of those lines for which bona fide purchase offers have been made, or, to put it another way, I should postpone abandonment of some of those segments of the Railroad for which express consideration has been given by the I.C.C., but which are not included in the Appendix D of the Commerce Commission report.

I have been awaiting bona fide offers for purchases of a variety of segments of this line for many months, and there have been not many forthcoming. I've really come to suspect that other persons who might be interested, other railroads, private business, these states, have not moved too quickly because they have been waiting for abandonment and distressed sale prices. I recognize [65] problems created by the cessation of service in many areas, but I have not seen any rush to come up with the money, the means, the know how to offer to purchase or lease segments of the line and continue their operations, or even to enter into bona fide purchase negotiations. There are some few offers pending that I'm sure are bona fide offers, and I do intend to provide for those in a way that will be made clear as we work out a final form of this order.

Abandonment is really only a technical recognition in this case of what I might have previously ordered and what has actually happened. I assert, despite arguments to the contrary, that I have jurisdiction to order total system abandonment, and I have intended to do so and I intend today to confirm that abandonment based upon that jurisdiction. Section 17 of the Milwaukee Act and its labor protection provisions contemplate less than entire system abandonment in imposing labor protection obligations, and

that section does not apply here. Even if the Milwaukee Restructuring Act and Section 17 of that Act is not legally infirm in other respects, it is not intended to control the situation I face.

The RLEA has made an argument, and I must commend the young man who made it for impressibly arguing his point, that there should be notice and hearing, not [66] emphasis on notice, but emphasis upon hearing, on hearing aspect of giving everybody an opportunity evidentiary-wise to give the Court input into the decision we're making today. Well, in a sense there has been notice, this hearing has been noticed, and anything filed I have considered and I've listened to everybody today, but in a broader sense, as one of the creditors argued, I've been holding hearings on the subject of abandonment of the Rock Island for five years. Five years of arguments, reports, surveys, audits, plans, Commerce Commission recommendations, all with a view towards assisting me in making the ultimate determination as to whether the Rock Island could be reorganized in any viable way or whether the Rock Island must be abandoned, and I've had all the hearings I have to have or need to have on the subject of the need and desirability of an order to discontinue operations.

I have determined, based on all of these hearings, that there's nothing left which can be reorganized into an operating Rock Island Railroad, and that those smaller segments of the total Rock Island System which are susceptible to viable operations are susceptible only to viable operations by some other railroad and not within any structure that we can make of the existing Rock Island System.

[67] The jurisdiction is mine to exempt certain lines from the abandonment order for a short time, and I have been asked to do so and, as I said, pending hearings, the I.C.C. has considered this question and has listened, I am sure, and has read as many of the same arguments as I have heard today and many of the pleadings before me, and the

I.C.C. has twice made its public interest determination, once in determining those lines subject to a directed service order, and secondly, in terms of the content of Schedule D, or Appendix D to their current recommendations.

The I.C.C. are the experts. They are the experts in railroad operations and in the public interest, and I accept their expertise and I accept their recommendations and I intend to follow them. That means that there are many lines in which parties today expressed an interest or many segments of the lines which are subject to an abandonment order. But, the lines are still there, the ties are there, the tracks are there, the right-of-way is there, if anyone wants to buy them and start them up again and pay a reasonable price for them, they will be amazed by the cooperation they will get from the Trustee and from the Court.

It would be my intention to include in any order a provision that there be no scrapping of any segment [68] of the Railroad for the same term that the exemption for the specified segments of the line runs, it has been suggested that it be 180 days, in any area where there is an expression of interest on the part of any bona fide purchaser or any genuine hope or expectation on the part of the Trustee for a sale to a potential operator. So, in other words, it makes common sense that we don't scrap what we hope we can ultimately sell for something higher than scrap value.

So, the motion to confirm the discontinuance of the Rock Island Railroad operations will be granted. The abandonment of the operations is ordered, and by that I mean a total system abandonment. I agree with the exemption of those segments designated by the I.C.C from this order for 180 days, as long as the operations that we are discussing are carried on by other carriers under lease or under a directed service order, so that the financial burden of these operations, if there is one, is not one of the Estate.

I refuse to impose any labor protection conditions under Section 17 of the Milwaukee Restructuring Act, and the

RLEA motion for a stay of this order pending appeal is denied.

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[77] MR. CLARKE: Your Honor, there's one point I'd like to clarify. Your Honor said that the motion by RLEA for a stay is denied. I assume, if I understand correctly, that the motion your Honor was talking about was the motion I filed today dealing with the stay of any further liquidation.

THE COURT: Yes, that's the motion I was referring to.

MR. CLARKE: Your Honor, I'd like to direct your attention to Section 1170(d)(1), which we submit is applicable to this case through 17(a) of the Milwaukee Restructuring Act. 1170(d)(1) of the Bankruptcy Act says, "Enforcement of an order authorizing such abandonment [78] shall be stayed until the time for taking an appeal has expired, or if an appeal is timely taken, until such order has become final."

THE COURT: What is pending on appeal now?

MR. CLARKE: Your Honor, right now the only appeal pending is the appeal by RLEA, at least the appeal of any matters dealing here.

THE COURT: Of what?

MR. CLARKE: Of the liquidation and the refusal to transmit the order of January 25.

THE COURT: This is really a confirmation of the liquidation in a sense, the order of abandonment.

MR. CLARKE: Yes, your Honor, but I might add, your Honor, that RLEA will be filing a notice of appeal from your Honor's order today.

THE COURT: I understand that, and I think that notice of appeal and your first move in the Court of Appeals is to indicate that I've denied the stay and ask them for one, because your motion for a stay today is denied.

MR. CLARKE: Yes, your Honor, but we have not made a motion for a stay of your Honor's order authorizing abandonment, and we would submit that 1170(d)(1)——

THE COURT: Is applicable through 17, which I've said does not apply to total abandonment in this case.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 B 2697

In the Matter of:

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,
Debtor.

In Proceedings for the Reorganization of a Railroad

ORDER NO. 248

This cause coming on as the hearing heretofore set by this Court by its Order No. 232 entered April 14, 1980, upon the Motion filed by William M. Gibbons, the Trustee herein and by the Indenture Trustees and the Henry Crown et al. intervenor interests and upon the direction of the Court to the said Trustee herein to file an application with the Interstate Commerce Commission for its report confirming the abandonment of the Debtor's ("Rock Island") total railroad system, the said application to be filed as described in Section 17 of the Milwaukee Railroad Restructuring Act (MRRA) and Section 1170 of the Bankruptcy Code, and

It appearing to the Court that the Interstate Commerce Commission has filed its report dated May 23, 1980 containing its advisory recommendations as prescribed under Section 17 of the MRRA as aforesaid and recommending total system discontinuance of service and abandonment, subject only to service continuity by other carriers at certain defined points and segments pending possible transfer or sale to such carrier or other entities who may desire to continue such rail service, and

It further appearing to the Court that due notice of the hearing set has been given by the Trustee as prescribed by the Court in its Order No. 232, and the Court and having fully considered the report of the Interstate Commerce Commission, as well as the written comments of various

parties in interest including those of various shippers, federal, state and local agencies and the Railway Labor Executives [*sic*] Association, as well as the legal memoranda submitted by the Trustee and creditors of this estate as well as by the Railway Labor Executives' Associates, and

The Court having found that Rock Island's unconditional discontinuance of service and its total system abandonment is constitutionally mandated and having further found that to force a railroad to continue operations indefinitely at a loss in order that the public may be served is a violation of the Fifth Amendment rights of those who have a security interest in the enterprise. *Brooks-Scanlon Co.* v. *Railroad Commission,* 251 U.S. 396 (1920); and

The Court having further found that labor protective conditions or arrangements are not required of Rock Island's estate pursuant to Section 17 of the MRRA by reason of Rock Island's systemwide termination of operations and total line abandonment which do not warrant further consumption of Rock Island's assets for protection payments to employees whose jobs with Rock Island are no longer in existence by reason of such total abandonment and operational discontinuance. *Montpelier & Barre Railroad Co. Abandonment* (Dkt. No. AB-202 F) _____ I.C.C. _____ (1980); *Northampton & Bath Railroad Co. Abandonment,* 354 I.C.C. 784 (1978); *Wellsville, Addison & Galeton Railroad Corp. Abandonment,* 354 I.C.C. 744 (1978); *Tennessee Central Railway Co. Abandonment,* 333 I.C.C. 443 (1968); *Okmulgee Northern Railway Co. Abandonment,* 320 I.C.C. 637 (1964); *Rutland Railway Corp. Abandonment,* 317 I.C.C 393 (1962), *aff'd sub nom. Brotherhood of Locomotive Engineers* v. *United States,* 217 F. Supp. 98 (N.D. Ohio 1963); *Chicago Attica & Southern Railroad Co. Abandonment,* 261 I.C.C. 646 (1946), and, that consistent with ICC precedent, with the Rock Island's constitutional right to abandon its lines and discontinue its service, and with the equities of the Rock Island situation, no labor protec-

tion arrangements may be imposed on the Rock Island estate; and

The Court being fully advised in the premises,

NOW THEREFORE IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That the total systems abandonment of Rock Island's lines and the discontinuance of all of its rail services and obligations as a common carrier is hereby confirmed and decreed, such abandonment to be consistent, however, with the recommendations of the Interstate Commerce Commission pertaining to the transfer, sale or disposition of track and trackage rights as contained in the report of the Commission dated May 23, 1980; provided, however, that the reasonable period within which the Trustee shall retain the lines designated in Appendix D to the ICC Report shall not exceed 180 days from the date of this Order. That in entering this order, the Court is cognizant that a further order may be required with respect to passenger commuter service pursuant to Section 120 of the Rock Island Transition and Employee Assistance Act.

2. That no claim or arrangement of any kind or nature for employee labor protection payable out of the assets of the Debtor's estate is allowed or required by this Court pursuant to Section 17 of the Milwaukee Railroad Restructuring Act and the Trustee is hereby directed not to pay any such claim or to borrow for such purpose, any and all such claims or arrangements being hereby denied and prohibited by the Court.

Enter
/s/ FRANK J. MCGARR
U.S. District Judge

Dated June 2, 1980

REPORT TO THE PRESIDENT BY EMERGENCY BOARD NO. 191

APPOINTED BY EXECUTIVE ORDER 12159, DATED SEPTEMBER 20, 1979, PURSUANT TO SECTION 10 OF THE RAILWAY LABOR ACT, AS AMENDED.

To investigate disputes between Chicago, Rock Island and Pacific Railroad Company and certain of their employees represented by the United Transportation Union and the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes.

(National Mediation Board Case Nos. A-10287, A-10303, A-10324, A-10313 and A-10314)

WASHINGTON, D.C.
October 22, 1979

Washington, D.C.
October 22, 1979

The President
The White House
Washington, D.C.

Dear Mr. President:

On September 20, 1979, pursuant to Section 10 of the Railway Labor Act, as amended, and by Executive Order 12159, you created an Emergency Board to investigate disputes between the Chicago, Rock Island and Pacific Railroad Company and certain of its employees represented by the United Transportation Union and the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes.

Following its investigation of the issues in dispute, the Board developed recommendations that were accepted as the basis for a settlement of those issues that separated the parties from agreement.

The Board now has the honor to inform you of a settlement of the issues out of which these disputes arose and to submit its Report concerning the recommendations that led to the settlement.

Respectfully submitted,

/s/ James J. Reynolds
James J. Reynolds
Chairman

/s/ Ida Klaus
Ida Klaus
Member

/s/ Nicholas H. Zumas
Nicholas H. Zumas
Member

I. CREATION OF THE EMERGENCY BOARD

Emergency Board No. 191 was created by President Carter on September 20, 1979, by Executive Order No. 12159, pursuant to Section 10 of the Railway Labor Act, as amended (45 U.S.C. 160).

The creation of the Emergency Board was based upon the recommendation of the National Mediation Board (NMB) because of the existence of a strike by the United Transportation Union (UTU) and the Brotherhood of Railway, Airline and Steampship Clerks, Freight Handlers, Express and Station Employes (BRAC) against the Chicago, Rock Island and Pacific Railroad Company (Rock Island), which the NMB found was depriving the Middle West of essential transportation service.

The strike followed a long period of unfruitful negotiations between the parties which commenced in early 1977, mediatory efforts by the NMB, rejection of proffers of arbitration, and rejection of the recommendations of a Special Board of Inquiry by one of the labor organizations.

The President appointed the following members of the Board: James J. Reynolds, former Under Secretary of Labor and retired President of the American Institute of Merchant Shipping, Washington, D.C., chairman; Ida Klaus, member of the New York State Public Employment Relations Board, Attorney and Labor Arbitrator, New York, New York, member; Nicholas H. Zumas, Attorney and Labor Arbitrator, Washington, D.C., member.

II. HISTORY OF THE DISPUTES

The Rock Island is the fourth largest rail carrier of grain in the western region of the United States, operating

over some 7,500 miles of track in 13 midwestern states.[1] Since March 17, 1975, the Rock Island has been in reorganization under Chapter 77 of the Bankruptcy Act under the direction of a trustee appointed by the U.S. District Court for the Northern District of Illinois, Eastern Division.[2] BRAC represents some 1,600 employees on the Rock Island. UTU represents some 2,500 employees on the property. These employees are organized in three branches: UTU(E) representing firemen, UTU(S) representing switchmen, and UTU(T) representing conductors and brakemen.

The BRAC-Rock Island Dispute

On April 1, 1977, pursuant to Section 6 of the Railway Labor Act, BRAC served the Rock Island with a Notice of its desire to revise wages and work rules. On April 28, 1977, an initial conference was held to discuss the revisions sought by BRAC. At this conference, the Carrier informed BRAC that it would not grant the National Railway Labor Conference (NRLC) power of attorney to negotiate wages and work rules on a National basis for the Rock Island. The Rock Island determined to proceed with negotiations separately. The Rock Island did not submit formal Section 6 Notices at that time, but submitted a number of proposed rules changes for informal discussion with BRAC.

During the negotiations in 1977 no agreement was reached. On December 22, 1977, the Rock Island elected to serve formal Section 6 Notices. On January 10, 1978, BRAC served additional Section 6 Notices for concurrent handling. Negotiations on the formal Section 6 Notices began

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[1] Currently, the Rock Island's operations are being conducted by Kansas City Terminal Railway Company under the Directed Service Order of September 26, 1979, issued by the Interstate Commerce Commission.

[2] The Court directed the Trustee on October 10, 1979, to present a plan of reorganization or a plan of liquidation within 60 days.

in January 1978 and continued at various times through August 1978, with no agreement.

On August 8, 1978, BRAC invoked the services of the National Mediation Board (NMB).[3] Mediation sessions were held in January and May of 1979. On June 20, 1979, the NMB proffered arbitration, which was rejected by the Carrier and accepted by BRAC. On August 11 and 17, 1979, the NMB resumed "mediation in the public interest" in Washington, D.C.; however, no agreement was reached. On August 28, 1979, BRAC struck the Rock Island.

The UTU-Rock Island Dispute

On January 3, 1977, the three branches of UTU served Section 6 Notices for changes in wages and work rules. An initial conference was held on these Notices on February 1, 1977, at which time it was agreed to suspend further negotiations until a later date. The Rock Island served its Section 6 Notices on August 29, 1977. Supplemental Section 6 Notices were served by the parties between September 1977 and July 1978.

Negotiations between the Rock Island and each of the three branches of UTU were conducted separately. Bargaining with UTU (E & S) commenced in September 1977, and with UTU(T) in October 1977. The negotiations with the three branches continued at various dates through August 1978, and one joint session was held on March 22, 1978. On June 15, 1978, UTU(T) invoked the services of the NMB.[4] On July 12, 1978, and on August 23, 1978, UTU(S) and UTU(E), respectively, also invoked the services of the NMB.[5] Mediation sessions were held on both a

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[3] The case was docketed as NMB Case No. A-10313. A companion case involving the Peoria Terminal was docketed as NMB Case No. A-10314.

[4] The case was docketed as NMB Case No. A-10324.

[5] These cases were docketed as NMB Case Nos. A-10303 and A-10287, respectively.

separate and joint basis on various dates between September 1978 and March 1979. While these sessions did not produce a settlement, the focus of the dispute was narrowed.

On April 6, 1979, the NMB proffered arbitration to the parties, which was ultimately rejected by both parties. Mediation was resumed on May 21, 1979, and on May 23, 1979, the parties agreed to a mediator's proposal to establish a Special Board of Inquiry to investigate and make recommendations concerning the issue of retroactive pay. The Special Board began hearings on July 26, 1979, and issued its Report and Recommendations on August 27, 1979. Two days later, UTU struck the Rock Island.

Following the strikes by BRAC and UTU, the National Mediation Board held further "mediation sessions in the public interest" on September 11, 1979.

III. ACTIVITIES OF THE EMERGENCY BOARD

The Board convened in Washington, D.C., on October 2, 1979, for on-the-record ex-parte hearings with BRAC and on October 3, 1979, with UTU. Similar on-the-record ex-parte hearings were held with the Rock Island on October 4, 1979, concerning its dispute with BRAC, and on October 5, 1979, concerning its dispute with UTU.

Transcripts and exhibits submitted to the Board were exchanged at the direction of the Board. After a recess to provide time for a careful review of the materials exchanged, the Board commenced a series of off-the-record discussions with the Rock Island on October 11, 1979. A series of off-the-record discussions was commenced with BRAC on October 13, 1979, and with UTU on October 15, 1979. These discussions provided the Board with further views on the issues in dispute, and with reactions to what had been presented by the other side in each of the disputes.

The Board commenced intensive mediation efforts on October 16, 1979. While these efforts were helpful in narrowing the areas of dispute, several key issues remained unresolved. The Board therefore concluded that the best course of action in aiding the parties to reach a final agreement would be to make recommendations and urge their acceptance as a basis for settling all unresolved issues. During the following two days, these recommendations were presented to the parties. On October 18, 1979, they were accepted as a basis for agreement on all unresolved issues.

IV. ISSUES

Out of this long history of unsuccessful negotiations and mediation efforts, there emerged two major issues. On the one hand, the Rock Island, experiencing severe financial difficulties, was determined to obtain substantial relaxation of work rules which it insisted were inhibiting its ability to effectively operate its rail system. On the other hand was an equally determined adherence by the labor organizations to the preservation of the principle of full retroactivity in this industry. Both BRAC and UTU were seeking application of some benefits of their National wage settlements with NRLC, some aspects of which went back to January 1, 1978.

In the case of BRAC-represented employees, the period of retroactivity ended on October 5, 1979, when BRAC returned to work under the ICC Directed Service Order. In the case of UTU-represented employees, the period of retroactivity ended on May 1, 1979, when National wage rates were implemented on the Rock Island pursuant to the May 23, 1979, agreement reached under the auspices of the National Mediation Board.

As early as 1977, the Carrier contended that it could not and would not pay any retroactive wages because of its precarious financial condition, as evidenced by its bank-

ruptcy and the creditors' demand for liquidation of the railroad. It was the Rock Island's position in negotiations that, while retroactive pay was out of the question, it would, upon necessary rules modifications, pay the National wage scale under the following conditions:

A. The full National wage scale would become effective on January 1, 1978, if settlement was reached in 1977.

B. The full National wage scale would become effective on the first day of the calendar month in which negotiations were concluded, for settlements reached on or after January 1, 1978.

The Rock Island recognized in 1977 that certain unions negotiating at the National level might not reach agreement with the NRLC until some time after January 1, 1978, and that the amount due its employees under the first alternative could not be calculated until National settlement. It did not view payment of the increased wages as retroactive because agreements under the first alternative above were reached prior to the effective dates specified in the National Agreement, and the Carrier had the benefit, as of January 1, 1978, of the rule relief sought. Thus, cost savings could begin to provide the resources needed to pay the National rate, and the funds could be realized pending resolution of the National rate. Five unions settled their negotiations with the Rock Island in 1977 under the first alternative.

Seven unions settled with the Rock Island in 1978 or 1979. In each of those instances, the National wage rate became effective on the first day of the calendar month in which agreement was reached. Retroactivity was "waived" in the various agreements for periods ranging from two to twelve months. In no case did the Rock Island agree to pay the higher rate retroactive to January 1, 1978, although the Carrier did agree in these negotiations to do so if

either BRAC or UTU was successful in obtaining retroactivity. Rock Island based its unwillingness to pay retroactive wages on the ground that if it did not obtain any rule relief from these unions during the retroactive period, it would experience no gain in productivity to help offset the higher operating costs that would result. The Carrier asserted that BRAC and UTU could have received the National wage rate at any time had they been willing to reach agreement on certain proposed rules and rules changes sought by the Rock Island.

Finally, the Carrier asserted that it could not pay retroactive wages, even if it desired to do so, because it had no cash, and would not be able to generate sufficient funds in the foreseeable future. Rock Island estimated that the total cost of retroactivity would approximate $14 million.

BRAC rejected the Rock Island's arguments primarily on the ground that retroactive wage adjustments are a traditional and expected part of collective bargaining in the railroad industry. That Union asserted that the Rock Island has a moral, if not legal, obligation to make the full wage pattern of the National Agreement applicable to the Rock Island.

BRAC also viewed the bargaining context between itself and the Carrier as being substantially different from the negotiations involving the unions that had settled with the Rock Island. It contended that those unions were asked to make minor or insignificant rules changes that had little impact on earnings or employment in those crafts or classes. By contrast, the demands made upon its members would, if granted, lead to a significant reduction in the number of BRAC-represented employees. In particular, BRAC pointed to the Rock Island's proposals regarding the Train Order Rule and the Holiday Work Rule. The greater complexity of the negotiations involving BRAC would, under the best of circumstances, have led to prolonged and difficult negotiations. This being so, it was the

Union's position that it was unfair to penalize its members by refusing to consider retroactive wages as an essential part of the final agreement.

The UTU arguments were in many respects similar to those of BRAC. The rules sought by the Rock Island, particularly in the area of Short Haul-Gathering Service, were complex and far more extensive than the rules changes sought from the non-operating unions. The Rock Island-UTU negotiations were further hampered by the need to coordinate the negotiations among the trainmen, enginemen, and switchmen, and by the interrelationship of UTU with other crafts, especially the Brotherhood of Locomotive Engineers.

Moreover, UTU asserted that the Rock Island's failure to grant retroactivity in December 1978, at the time that all other issues had been tentatively resolved, was the major factor in the mounting retroactivity claim.

Ancillary issues existed in both disputes, generally involving the Carrier's need for productivity savings to generate resources to pay for the settlement.

In the case of UTU, the most important productivity issue was the Rock Island's proposed Short Haul and Gathering Service agreement. The Carrier wanted to institute these new services as a means of generating additional business. Institution of these services would permit the Rock Island to compete more successfully with the trucking industry.

Articles X and XI of the UTU National Agreement were also in issue, because Rock Island wanted the benefits of the relief afforded to other railroads under the National Agreement.

In the BRAC dispute, the Rock Island sought to suspend for a time the penalty provisions of the Train Order Rule,

so that operating craft employees could write train orders. The Carrier also wanted to add an exception to the Rule which would make it inapplicable at blind sidings, upon reinstatement of the Rule.

The Rock Island also sought to amend the Holiday Work Rule to eliminate the requirement that every job be filled on a holiday. It also wanted to reduce the entry rates for new employees during the first two years of employment.

BRAC sought to increase per diem and mileage allowances, and to increase the coverage of the Job Stabilization Program by covering employees who entered service on the Rock Island prior to 1972. BRAC also sought to apply the National Agreement on the Rock Island, except to the extent that the parties provided otherwise.

V. THE BOARD'S RECOMMENDATIONS

The Recommendations made by this Emergency Board were predicated on two conditions: (1) That the Rock Island would resume operations as a reorganized viable entity bearing the approval of the ICC and the District Court; and (2) That there would be a relaxation by the labor organizations of certain work rules, and a willingness to accept innovations, both of which would generate additional productivity savings.

These Recommendations set forth below, were accepted by the parties as the basis for settlement.

Emergency Board No. 191 recommends the following settlement of the dispute between the Chicago, Rock Island and Pacific Railroad and the United Transportation Union:

I. Retroactive Pay

A. The Rock Island will pay full retroactivity under the terms of the National Agreement for the period

of January 1, 1978, to April 30, 1979, upon assumption of operations by a successor company under a plan of reorganization approved by the Interstate Commerce Commission and confirmed by the U. S. District Court.

B. Payments will be made in sixteen (16) equal monthly installments, beginning during the first month of operations as outlined in paragraph I.A. above.

II. Wages. COLA. Rules

A. The parties agree to adoption of the May 23, 1979, Memorandum of Agreement and Letters of Understanding covering increased wage rates, COLA, and rule changes affecting the UTU (T), (E), and (S) crafts, effective upon assumption of operations.

B. Articles X and XI of the National Mediation Agreement of August 25, 1978, shall be adopted. National interpretations of these articles shall be applied.

C. The Rock Island will withdraw the Carrier's promulgated rules of August 29, 1979, covering the UTU (T), (E), and (S) crafts.

III. Short Haul—Gathering Service

The parties will adopt the May 23, 1979, Short Haul-Gathering Service Agreement. The UTU General Chairmen will meet with the Rock Island to draft the necessary implementing agreements for the principles contained in the Short Haul-Gathering Service Agreement. The parties will negotiate any additional changes, amendments, or clarifications as may be necessary to assure the success of these new services.

IV. Interchange

The parties agree to negotiate a settlement of the "interchange" dispute.

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Emergency Board No. 191 recommends the following settlement of the dispute between the Chicago, Rock Island and Pacific Railroad and the Brotherhood of Railway and Airline Clerks:

I. Retroactive Pay

A. The Rock Island will pay full retroactivity under the terms of the National Agreement for the period of January 1, 1978, to October 5, 1979, upon assumption of operations by a successor company under a plan of reorganization approved by the Interstate Commerce Commission and confirmed by the U.S. District Court.

B. Payments will be made in sixteen (16) equal monthly installments, beginning in the first month of operations as defined in paragraph I.A. above.

II. Wages

A. The wage and COLA provisions as set forth in the National Agreement between BRAC and the National Railway Labor Conference, bearing an effective date of January 30, 1979, shall be applied to the employees, to become effective upon assumption of operations. In applying this section, wage increases and COLA due after said start-up date will be applied on the dates set forth in the National Agreement.

B. Article VIII—Entry Rates, of the National Agreement, effective January 30, 1979, is hereby modified to provide for entry rates of 85% of the basic rate during a new employee's first year of service and 92% for the second year of service, effective upon assumption of operations.

III. Per Diem & Mileage

All existing rules and agreements dealing with traveling away from assigned headquarters point will be amended to provide:

(A) Lodging expense provided for in Article I, Section A(3) shall be increased from $4.00 per day to $7.00 per day;

(B) Meal allowances provided for in Article I, Sections B(1), B(2) and B(3) shall be increased from $1.00, $2.00, and $3.00 per day respectively to $1.75, $3.50 and $5.25, respectively;

(C) The allowance for the use of an employee's personal automobile provided for in Article I, Section C(2) shall be increased from twelve (12) cents a mile to fifteen (15) cents a mile; and

(D) The maximum reimbursement for meals and lodging costs provided for in Article II, Section B shall be increased from $7.00 per day to $12.25 per day.

IV. Job Stabilization

The applicable Job Stabilization Agreement (February 7, 1967), will be revised and amended to provide:

(A) Employees having an employment relationship with the carrier as of December 31, 1971 shall be placed in protected status;

(B) The protected rates of pay for all employees covered by the revised Agreement shall be the rate of pay of the position occupied on August 1, 1979, or the protected rate in effect, whichever is higher, subject to subsequent increases; and

(C) In instances where employees are drawing furlough allowances, the allowance will be reduced by any compensation the employee receives under

the Railroad Unemployment Insurance Benefits Act, and any compensation received from full time employment in outside industry, obtained following the date of furlough.

(D) Any employee on furlough as of the date of assumption of operations will be covered upon return to service.

(E) A protected employee shall have his protected allowance suspended after five years in furlough status, provided, however, that the full protected status of such employee shall be fully restored upon recall to service.

(F) The parties will negotiate guidelines which will be applied in the consolidation of seniority districts.

V. Work Rules

A. *Train Order Relief.* During the first 24 calendar months immediately following assumption of operations, BRAC agrees to waive the three-hour and eight-hour penalty provisions of Rule 17—Train Orders, provided however, that during said 24 month period, no position handling train orders will be abolished because of or as a result of this waiver.

Prior to the end of the 24 month period, the parties will review the experience under the waiver, with a view to possible extension or modification.

Upon expiration of the 24 calendar month period referred to herein, any work diverted from the craft or class here represented will be returned to coverage by this Agreement, at which time the Rule 17, Paragraph 3(2), will be amended to provide the following exception: "3(2)(d)—That when train orders are relayed from the nearest open train order office on the

seniority district involved to train or engine service employees at blind sidings."

B. *Holiday Work.*—Article 54—Holiday Work, will be amended by addition of the following:

(a) When a holiday falls on a work day of a regularly assigned employee and his (her) position is to be worked, the regular employee is entitled to be used.

(b) When necessary work on two or more positions on the same shift is to be performed by one employee, it will be offered in seniority order to employees occupying the positions involved with the highest rate of pay of the position worked.

(c) When positions to be filled are vacant because of the regular occupant being permitted to lay off, or because there is no regularly assigned incumbent on the holiday, the opportunity to fill the vacant position will be offered to qualified regularly assigned employees on the same shift at the same location whose positions were pulled off or combined with others. If not filled in this manner, the vacancy will be filled in accordance with Article VIII or IX of Rule 13.

C. *Vacations.* The vacation provisions of the National Agreement referred to above will be made effective and applied upon assumption of operations, but in no event earlier than January 1, 1980.

D. The Rock Island will withdraw the Carrier's promulgated rules of August 29, 1979, covering the BRAC-represented employees.

VI. National Agreement

The parties agree that the National Agreement between BRAC and the National Railway Labor Conference signed on January 13, 1979, and effective nationally on January 30, 1979, shall be applied except to the extent set forth above.

Respectfully submitted,

/s/ JAMES J. REYNOLDS
James J. Reynolds
Chairman

/s/ IDA KLAUS
Ida Klaus
Member

/s/ NICHOLAS H. ZUMAS
Nicholas H. Zumas
Member

INTERSTATE COMMERCE COMMISSION

DECISION

Emergency Service Order 1398

KANSAS CITY TERMINAL RAILWAY COMPANY—DIRECTED TO OPERATE OVER—CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, DEBTOR (WILLIAM M. GIBBONS, TRUSTEE)

SUPPLEMENTAL ORDER NO. 2

Decided: October 3, 1979

On September 26, 1979, the Interstate Commerce Commission, pursuant to 49 U.S.C. § 11125, directed the Kansas City Terminal Railway Company ("DRC") to provide service for traffic originating or terminating on the lines of the Chicago, Rock Island & Pacific Railroad Company, Debtor (William M. Gibbons, Trustee) ("RI").

This supplemental order responds to various questions concerning Interpretation of Emergency Service Order 1398 raised during the course of preparation to implement directed service.

The order is properly interpreted as requiring the DRC to assume the responsibilities for security and maintenance, including the making of lease payments, with respect to all properties of the Rock Island, including locomotives and freight cars, from the date of its entry upon the properties of the Rock Island until it is determined which properties cannot be used in providing directed service. Upon determining that specific properties cannot be used in directed service, the DRC shall simultaneously notify the Commission and the Trustee by hand delivery by providing a listing describing such properties and explaining why they cannot be used in providing directed service. Unless the Commission shall require otherwise, within five working days of its receipt by the Secretary of such a listing, responsibility for the security and maintenance, including

the making of lease payments with respect to all property except locomotives and freight cars, shall revert to the Trustee at the time specified in such notice (not less than five days from the date of filing with the Commission and service upon the Trustee).

More specifically, with respect to property other than locomotives and rolling stock, DRC shall pay the Trustee a sum sufficient to permit the Trustee to make current lease payments on all properties used to provide directed service for the period of directed service less any amounts due to the Trustee from others as rent for their use of properties used to provide directed service. When such property is returned to the custody of the Trustee after a lease payment has been made by the DRC, an adjustment shall be made to reflect the number of days such property was in the custody of DRC. No rent shall be paid to the Trustee for use of any property and facilities owned by the Rock Island other than rolling stock and locomotives.

With respect to rolling stock and locomotives, the DRC shall pay the Trustee a sum sufficient to make current lease payments on all such leased equipment for the period of directed service. As a precondition to this undertaking by the DRC, the Trustee shall agree with the DRC that lease payments attributable to equipment which is determined to be inoperable may be charged back to the Trustee as a claim against the estate or may be offset against payments due to the Trustee for the DRC's use of Rock Island-owned rolling stock and locomotives.

In addition, the DRC is authorized to pay directly to the lessor payments for leased locomotives and freight cars attributable to September 1979, but not paid by the Trustee. We find that the retention of them is essential to the DRC's ability adequately to provide directed service and that it can obtain the use of such equipment only by making such payment. As a precondition to making such payments, the DRC shall obtain an assignment of the lessor's claim

against the estate in favor of the United States and agreement of the Trustee that such amounts may be offset against payments due to the Trustee for the DRC's use of Rock Island-owned rolling stock and equipment. As a further precondition to the making of such payments, the Trustee shall agree to account for revenues earned as a result of operations during the month of September 1979.

The DRC is authorized and required to honor all outstanding agreements with shippers and states providing for repayment of monies advanced for car and track rehabilitation on a use basis covering property used by it to provide directed service during the period of directed service.

The DRC is also authorized and required to make payment to employees under the DSO in accordance with the interpretations set forth in the letter of October 1, 1979 signed by George M. Stafford as acting chairman. We find that use of such employees is required by law and that it would be impossible to obtain their services without making payments as described in that letter.

We find that all of the above expenditures, which the DRC is authorized and/or required to make, arise out of or are attributable to directed service under Emergency Service Order No. 1398 and as such are reimbursable to the DRC under 49 U.S.C. 11125(b)(5).

On page 18 of the Directed Service Order, we required the DRC to explain to the Commission if it could not commence directed service within 7 days of that decision's effectiveness. The DRC has been reporting progress to us on a daily basis and that date is now modified to 12:01 a.m. October 6, 1979. The effective date for commencing operations in ordering paragraph 23 on page 43 is also modified accordingly.

By the Commission, Chairman O'Neal, Vice Chairman Stafford, Commissioners Gresham, Clapp, Christian, Trantum, Gaskins, and Alexis. Commissioner Gresham voted to reject the decision and will be submitting a separate expression.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

INTERSTATE COMMERCE COMMISSION

Washington, D.C. 20423
October 1, 1979

Mr. Fred J. Kroll
International President
Brotherhood of Railway &
Airline Clerks
3 Research Place
Rockville, Md. 20850

Mr. V. E. Coe
President & General Manager
Kansas City Terminal
Railway Co.
Union Station
Kansas City, Mo. 64108

Gentlemen:

In order to clarify certain matters regarding the DSO we would like to clear up the following points:

1) On the first day directed service begins pursuant to the ICC DSO, BRAC represented employees shall all be permitted to return to work on the positions they held on August 27, 1979, and such employees will to the greatest extent possible be utilized during the directed service period. With respect to any force reduction thereafter and before any job abolishment notices, the Kansas City Terminal (KCT) must meet with the Brotherhood of Railway and Airline Clerks (BRAC) and representatives of the Department of Transportation (DOT), the National Mediation Board (NMB), Department of Labor (DOL), and Interstate Commerce Commission (ICC) and provide substantial evidence to show the need for such reduction. BRAC shall have the opportunity to rebut such evidence and the decision of DOT, NMB, DOL, and ICC shall be final.

2) All employees employed under the DSO will receive the wages set forth under the BRAC national agreement.

3) The KCT will pay any unpaid wages due for service rendered the Rock Island by employees prior to the DSO as quickly as possible.

4) In view of the fact that the employees not returning to work in September was not the result of any delay on the part of BRAC or the employees in implementing the DSO and restoring service: (1) For the purpose of health and welfare benefits it shall be deemed that all employees performed compensated service for the month of September, 1979; (2) coverage under the agreements in effect concerning Health and Welfare shall continue and remain unbroken for the period of directed service; and (3) KCT shall make payment for Health and Welfare coverage in the same manner as if all employees had rendered compensated service for the month of September, 1979, and KCT shall be responsible for timely providing whatever financial contributions are required to insure all employees are covered for their normal Health and Welfare benefits for the month of October, 1979, and thereafter, during the period of directed service.

5) The KCT will examine the applications for employment of all executive officers employed by the Rock Island with the utmost care.

6) The KCT will apply the rules of the Rock Island contracts with BRAC in effect as of August 27, 1979, and will consider all actions taken by any employees prior to the effective date of the directed service to be matters outside the employment relationship between the KCT and such employees and not subject to any reprisal or other disciplinary action.

Sincerely yours,

/s/ George M. Stafford
George M. Stafford
Acting Chairman

cc: Robert S. Sugarman
James L. Highsaw
J. H. Kenny

General Balance Sheets and Income Statements
1975-1980

WILLIAM M. GIBBONS, TRUSTEE OF CHICAGO,
ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR

General Balance Sheet as of December 31, 1975
in Accordance with Regulations of the
Interstate Commerce Commission

ASSETS

CURRENT ASSETS	
701—Cash	$ (1,322,478)
702—Temporary cash investments	22,144,790
703—Special deposits	4,698,433
705—Traffic and car service balances, Dr.	4,445,889
706—Net balance receivable from agents and conductors	9,371,886
707—Miscellaneous accounts receivable	5,855,864
708—Interest and dividends receivable	51,971
709—Accrued accounts receivable	16,447,516
710—Working fund advances	127,950
711—Prepayments	1,452,033
712—Material and supplies	22,588,804
713—Other current assets	487,196
Total Current Assets	$ 86,349,854
SPECIAL FUNDS	
715—Sinking Funds	$ —
716—Capital and other reserve funds	604,689
717—Insurance and other funds	—
Total Special Funds	$ 604,689
INVESTMENTS	
721—Investments in affiliated companies	$ 17,882,630
722—Other investments	1,239
Total Investments	$ 17,883,869
PROPERTIES	
731—Road and equipment property	$502,154,345
732—Improvements on leased property	1,933,927
Total Transportation Property	$504,088,272

733—Accrued depreciation—Improvements on leased property	(509,949)
735—Accrued depreciation—road and equipment	(173,469,923)
736—Amortization of defense projects—road and equipment	(2,379,013)
Total Transportation Property Less Recorded Depreciation and Amortization	$327,729,387
737—Miscellaneous physical property	4,458,510
738—Accrued depreciation—miscellaneous physical property	(1,051,605)
Miscellaneous Physical Property Less Recorded Depreciation	$ 3,406,905
Total Properties Less Recorded Depreciation and Amortization	$331,136,292

OTHER ASSETS AND DEFERRED CHARGES

741—Other assets	$ 2,320,290
742—Unamortized discount on long-term debt	686,923
743—Other deferred charges	2,144,127
Total Other Assets and Deferred Charges	$ 5,151,340
Total Assets	$441,126,044

( ) Denotes credit

Note: In conformity with Order 42 issued by the United States District Court for the Northern District of Illinois—Eastern Division, No. 75B-2697, the following special deposits in trust for the United States were made on the dates shown:

Federal Tax Withholding	$ 826,747.25	December 15, 1975
Federal Retirement Tax	231,305.01	December 15, 1975
Federal Tax Withholding	159,093.70	December 19, 1975
Federal Retirement Tax	46,499.10	December 19, 1975
Federal Tax Withholding	869,911.05	December 31, 1975
Federal Retirement Tax	301,798.65	December 31, 1975
Total:	$2,435,354.76	

WILLIAM M. GIBBONS, TRUSTEE OF CHICAGO,
ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR

General Balance Sheet as of December 31, 1975
in Accordance with Regulations of the
Interstate Commerce Commission

LIABILITIES

CURRENT LIABILITIES

752—Traffic and car service balances, Cr. ...	$ 1,240,358
753—Audited accounts and wages payable ..	6,890,638
754—Miscellaneous accounts payable	2,520,201
755—Interest matured unpaid	7,084
756—Dividends matured unpaid	—
757—Unmatured interest accrued	63,883
759—Accrued accounts payable	40,053,931
760—Federal income taxes accrued	—
761—Other taxes accrued	2,645,695
763—Other current liabilities	4,008,098
Total Current Liabilities	$ 57,429,888

LONG-TERM OBLIGATIONS DUE WITHIN ONE YEAR

764—Equipment obligations	$ 1,302,789

LONG-TERM DEBT

765—Funded debt unmatured in hands of public	$ —
766—Eqiupment obligations	3,582,335
768—Debt in default	100,462,028
769—Amounts payable to affiliated companies	1,071,523
Total Long-Term Debt	$105,115,886

RESERVES

771—Pension and welfare reserves	$ 560,000
774—Casualty and other reserves	6,636,366
Total Reserve	$ 7,196,366

OTHER LIABILITIES AND DEFERRED CREDITS	
781—Interest in default	$ 1,847,575
782—Other liabilities (under reorganization proceedings)	70,929,590
782—Other liabilities	13,028,105
784—Other deferred credits	8,724,314
785—Accrued liability—leased property	83,414
Total Other Liabilities and Deferred Credits	$ 94,612,998
SHAREHOLDERS' EQUITY	
791—Capital stock	$146,058,050
798—Retained income—unappropriated	25,586,398
Total Shareholders' Equity	$171,644,448
Total Liabilities and Shareholders' Equity	$437,302,375

Certified Correct:

/s/ VICTOR C. BOHNE
Comptroller

Note: **The company's results of operations are included in Retained Income without adjustment which ultimately may result from company's entry into reorganization under the Bankruptcy Act on March 17, 1975. The obligations classified above as being in default are so classified only because on March 17, 1975, the company filed a petition seeking reorganization under the Bankruptcy Act, which action is defined as an event of default in the instruments under which the obligations were issued.**

March 12, 1976—Audited

WILLIAM M. GIBBONS, TRUSTEE OF CHICAGO,
ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR

Income Statement
in Accordance with Regulations of the
Interstate Commerce Commission

December 1975		January 1 to December 31, 1975
	REVENUES	
$26,153,925	Freight	$301,575,426
460,350	Passenger	5,011,487
1,669,121	Other	14,983,997
28,283,396	Railway Operating Revenues	321,570,910
	EXPENSES	
5,031,621	M. of W. & S. Excl. Deprn.	40,644,955
227,534	Depreciation	2,734,492
4,643,049	M. of Equip. Excl. Deprn.	52,902,435
476,376	Depreciation	5,478,716
608,989	Traffic	7,439,032
5,889,941	Transportation	144,886,293
35,552	Dining Car Operations	389,769
1,359,258	General	15,605,184
18,272,320	Railway Operating Expenses	270,080,876
10,011,076	NET REVENUE FROM RAILWAY OPERATIONS	51,490,034
	RAILWAY TAX ACCRUALS (Excl. Income)	
238,349	General	6,111,285
147,940	Railroad Unemployment Insurance	1,885,416
1,622,970	Railroad Retirement	20,383,963
2,009,259	Total	28,380,664
	RENTS—DEBIT BALANCE	
494,139	Equipment—Time & Mileage	7,685,182
582,635	Private Carline Mileage	7,490,946
3,310,884	Other	36,617,262
178,496	Joint Facility	2,433,939
4,566,154	Total Rents	54,227,329

3,435,663	NET RAILWAY OPERATING INCOME	(31,117,959)
367,887	Non-Operating Income	4,549,492
(166,613)	Equity in earnings (losses) of affiliated companies	(655,747)
328,545	Miscellaneous Deductions from Income .	676,880
3,308,392	INCOME AVAILABLE FOR FIXED CHARGES	(27,901,094)
196,018	Fixed Charges	2,331,796
—	Contingent Interest	—
3,112,374	INCOME (LOSS) BEFORE EXTRAORDINARY ITEMS	(30,232,890)
	EXTRAORDINARY ITEMS	
—	Loss on Derailment, Des Moines, Iowa..	(933,016)
$ 3,112,374	NET INCOME (LOSS)	$(31,165,906)

Certified Correct:

/s/ VICTOR C. BOHNE
Comptroller

Notes:

1. The Company's results of operations are included in Retained Income without adjustment which ultimately may result from Company's entry into reorganization under the Bankruptcy Act on March 17, 1975.

2. Revaluation of assets as a result of possible permanent impairment and other adjustments which may be required as a result of examination and audit of the accounts are not reflected in this statement.

WILLIAM M. GIBBONS, TRUSTEE OF CHICAGO,
ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR

General Balance Sheet as of December 31, 1978
in Accordance with Regulations of the
Interstate Commerce Commission

ASSETS

CURRENT ASSETS	
701—Cash	$ (396,953)
702—Temporary cash investments	20,016,362
703—Special deposits	1,853,923
705—Traffic and car service balances, Dr.	—
706—Net balance receivable from agents and conductors	9,855,502
707—Miscellaneous accounts receivable	4,974,604
708—Interest and dividends receivable	21,583
709—Accrued accounts receivable	15,246,873
710—Working fund advances	126,826
711—Prepayments	2,149,095
712—Material and supplies	25,632,929
713—Other current assets	541,758
Total Current Assets	$ 80,022,502
SPECIAL FUNDS	
715—Sinking Funds	$ —
716—Capital and other reserve funds	5,345,966
717—Insurance and other funds	—
Total Special Funds	$ 5,345,966
INVESTMENTS	
721—Investments in affiliated companies	$ 16,512,693
722—Other investments	1,239
Total Investments	$ 16,513,932
PROPERTIES	
731—Road and equipment property	$501,014,159
732—Improvements on leased property	1,906,299
Total Transportation Property	$502,920,458

733—Accrued depreciation—improvements on leased property	$ (533,587)
735—Accrued depreciation—road and equipment	(176,586,846)
736—Amortization of defense projects—road and equipment	(2,179,715)
Total Transportation Property Less Recorded Depreciation and Amortization	$323,620,310
737—Miscellaneous physical property	4,449,040
738—Accrued depreciation—miscellaneous physical property	(1,057,619)
Miscellaneous Physical Property Less Recorded Depreciation	$ 3,391,421
Total Properties Less Recorded Depreciation and Amortization	$327,011,731
OTHER ASSETS AND DEFERRED CHARGES	
741—Other assets	$ 8,556,450
742—Unamortized discount on long-term debt	628,880
743—Other deferred charges	5,208,552
Total Other Assets and Deferred Charges	$ 14,393,882
Total Assets	$443,288,013

( ) Denotes credit

Note: In conformity with Order No. 42 issued by the United States District Court for the Northern District of Illinois—Eastern Division, No. 75B-2697, the following special deposits in trust for the United States were made on the dates shown:

Federal Withholding Tax	$1,044,572.81	December 15, 1976
Federal Retirement Tax	294,152.04	December 15, 1976
Federal Withholding Tax	1,042,953.64	December 30, 1976
Federal Retirement Tax	350,176.76	December 30, 1976
	$2,731,855.25	

WILLIAM M. GIBBONS, TRUSTEE OF CHICAGO,
ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR

General Balance Sheet as of December 31, 1976
in Accordance with Regulations of the
Interstate Commerce Commission

LIABILITIES

CURRENT LIABILITIES	
752—Traffic and car service balances, Cr.	$ 2,500,553
753—Audited accounts and wages payable	9,896,891
754—Miscellaneous accounts payable	2,954,572
755—Interest matured unpaid	7,950
756—Dividends matured unpaid	—
757—Unmatured interest accrued	274,424
759—Accrued accounts payable	44,651,122
760—Federal income taxes accrued	—
761—Other taxes accrued	5,922,960
763—Other current liabilities	5,409,821
Total Current Liabilities	$ 71,618,293
LONG-TERM OBLIGATIONS DUE WITHIN ONE YEAR	
764—Equipment obligations	$ 1,585,366
LONG-TERM DEBT	
765—Funded debt unmatured in hands of public	$ —
766—Equipment obligations	3,042,076
767—Receivers' and Trustees' Securities	9,393,491
768—Debt in default	100,462,028
769—Amounts payable to affiliated companies	1,084,795
Total Long-Term Debt	$113,982,390
RESERVES	
771—Pension and welfare reserves	$ 680,000
774—Casualty and other reserves	9,061,205
Total Reserves	$ 9,741,205

OTHER LIABILITIES AND DEFERRED CREDITS	
781—Interest in default	$ 4,304,756
782—Other liabilities (under reorganization proceedings)	67,045,992
782—Other liabilities	17,225,093
784—Other deferred credits	11,098,318
785—Accrued liability—leased property	89,539
Total Other Liabilities and Deferred Credits	$ 99,763,698
SHAREHOLDERS' EQUITY	
791—Capital stock	$146,058,050
798—Retained income—unappropriated	539,011
Total Shareholders' Equity	$146,597,061
Total Liabilities and Shareholders' Equity	$443,288,013

Certified Correct:

/s/ VICTOR C. BOHNE
Comptroller

Notes:

1. The Company's results of operations are included in Retained Income without adjustment which ultimately may result from Company's entry into reorganization under the Bankruptcy Act on March 17, 1975. The obligations classified above as being in default are so classified only because on March 17, 1975, the company filed a petition seeking reorganization under the Bankruptcy Act, which action is defined as an event of default in the instruments under which the obligations were issued.

2. Adjustments normally made in year-end closing of accounts, revaluation of assets as a result of possible permanent impairment and other adjustments which may be required as a result of examination and audit of the accounts are not reflected in this statement.

February 11, 1977

WILLIAM M. GIBBONS, TRUSTEE OF CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR

General Balance Sheet as of December 31, 1977

ASSETS

CURRENT ASSETS	
701—Cash	$ (460,775)
702—Temporary cash investment	16,843,455
703—Special deposits	1,863,340
705—Traffic and car service balances, Dr.	—
706—Net balance receivable from agents and conductors	11,076,106
707—Miscellaneous accounts receivable	8,716,386
708—Interest and dividends receivable	22,534
709—Accrued accounts receivable	15,971,155
710—Working fund advances	126,726
711—Prepayments	2,020,216
712—Material and supplies	13,482,718
713—Other current assets	543,566
Total Current Assets	$ 70,205,427
SPECIAL FUNDS	
715—Sinking Funds	$ —
716—Capital and other reserve funds	8,246,805
717—Insurance and other funds	—
Total Special Funds	$ 8,246,805
INVESTMENTS	
721—Investments in affiliated companies	$ 15,587,092
722—Other investments	1,154
Total Investments	$ 15,588,246
PROPERTIES	
731—Road and equipment property	$708,618,034
732—Improvements on leased property	3,683,026
Total Transportation Property	$712,301,060

733—Accrued deprn.—improvements on leased property	$ (2,189,522)
735—Accrued deprn.—road and equipment	(351,248,018)
736—Amortization of defense projects—road and equipment	(1,878,431)
Total Transportation Property Less Recorded Depreciation and Amortization	$356,985,089
737—Miscellaneous physical property	4,489,952
738—Accrued depreciation—misc. physical property	(1,109,610)
Miscellaneous Physical Property Less Recorded Deprn.	$ 3,380,342
Total Properties Less Recorded Deprn. and Amort.	$360,365,431
OTHER ASSETS AND DEFERRED CHARGES	
741—Other assets	$ 5,006,196
742—Unamortized discount on long-term debt	—
743—Other deferred charges	5,219,742
Total Other Assets and Deferred Charges	$ 10,225,938
Total Assets	$464,631,847

( ) Denotes credit

Note: In conformity with Order No. 42 issued by the United States District Court for the northern district [*sic*] of Illinois—Eastern Division, No. 75B-2697, the following special deposits in trust for the United States were made on the dates shown:

Federal Withholding Tax	$1,047,430.82	December 13, 1977
Federal Retirement Tax	287,023.89	December 13, 1977
Federal Withholding Tax	1,056,224.43	December 28, 1977
Federal Retirement Tax	348,653.00	December 28, 1977
	$2,739,332.14	

WILLIAM M. GIBBONS, TRUSTEE OF CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR

General Balance Sheet as of December 31, 1977

LIABILITIES

CURRENT LIABILITIES	
752—Traffic and car service balances, Cr. ..	$ 5,141,244
753—Audited accounts and wages payable .	6,508,450
754—Miscellaneous accounts payable	8,133,242
755—Interest matured unpaid	7,668
756—Dividends matured unpaid	—
757—Unmatured interest accrued	633,568
759—Accrued accounts payable	43,355,158
760—Federal income taxes accrued	—
761—Other taxes accrued	5,744,572
763—Other current liabilities	8,766,411
Total Current Liabilities	$ 78,290,313
LONG-TERM OBLIGATIONS DUE WITHIN ONE YEAR	
764—Equipment obligations	$ 1,608,409
LONG-TERM DEBT	
765—Funded debt unmatured in hands of public	$ —
766—Equipment obligations	1,824,612
767—Receivers' and Trustees' Securities ..	16,938,917
768—Debt in default	100,462,028
769—Amounts payable to affiliated companies	1,234,784
770.1—Unamortized discount on long term debt	(571,683)
Total Long-Term Debt	$119,938,658
RESERVES	
771—Pension and welfare reserves	$ 712,959
774—Casualty and other reserves	11,152,192
Total Reserves	$ 11,865,151

OTHER LIABILITIES AND DEFERRED CREDITS	
781—Interest in default	$ 6,462,093
782—Other Liabilities	15,137,660
782—Other Liabilities (under reorganization proceedings)	
Incurred prior to reorganization	57,776,363
Incurred subsequent to reorganization	10,057,484
784—Other deferred credits	12,414,844
785—Accrued Liability—leased property	93,164
Total Other Liabilities and Deferred Credits	$101,941,608
SHAREHOLDER'S EQUITY	
791—Capital stock	$146,058,050
798—Retained income—unappropriated	4,929,658
Total Shareholders' Equity	$150,987,708
Total Liabilities and Shareholders' Equity	$464,631,347

Certified Correct:

/s/ VICTOR C. BOHNE
Comptroller

Note: The Company's results of operations are included in Retained Income without adjustment which ultimately may result from Company's entry into reorganization under the Bankruptcy Act on March 17, 1975. The obligation classified above as being in default are [*sic*] so classified only because on March 17, 1975, the company filed a petition seeking reorganization under the Bankruptcy Act, which action is defined as an event of default in the instruments under which the obligations were issued.

WILLIAM M. GIBBONS, TRUSTEE OF CHICAGO,
ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR

INCOME STATEMENT

	TWELVE MONTHS ENDED DEC. 31, 1977	DEC. 31, 1976
REVENUES		
Freight	$337,037,478	$317,750,925
Passenger	4,681,118	4,761,832
Other	21,252,621	18,807,301
Railway Operating Revenues	362,971,217	341,320,058
EXPENSES		
M. of W. & S. Excl. Depreciation	37,611,020	29,837,662
Depreciation	13,434,409	12,692,589
M. of Equip. Excl. Depreciation	56,667,790	50,557,050
Depreciation	5,161,576	5,199,795
Traffic	7,458,975	7,279,877
Transportation	159,121,710	148,596,733
Dining Car Operations	196,325	212,176
General	16,259,648	15,550,097
Railway Operating Expenses	295,961,453	[sic]270,125,979
NET REVENUE FROM RAILWAY OPERATIONS	67,009,764	71,194,079
RAILWAY TAX ACCRUALS (Excl. Income)		
General	3,701,675	5,643,872
Railroad Unemployment Insurance	3,349,798	2,331,404
Railroad Retirement	21,468,074	20,491,867
Total	28,519,547	28,467,143
RENTS—DEBIT BALANCE		
Equipment—Time and Mileage	8,322,094	8,321,999
Private Carline Mileage	8,749,588	7,415,624
Other	43,813,617	38,595,518
Joint Facility	1,327,811	2,486,283
Total Rents	62,213,110	56,819,424
NET RAILWAY OPERATING INCOME	(23,722,893)	(14,092,488)
Non-Operating Income	8,900,040	4,279,023

Equity in Earnings (Losses) of Affiliated Companies	(1,194,837)	(40,775)
Miscellaneous Deductions from Income	754,610	1,670,041
INCOME AVAILABLE FOR FIXED CHARGES	(16,772,300)	(11,524,276)
Fixed Charges	3,320,307	2,499,998
Contingent Interest		
NET INCOME (LOSS) Before Extraordinary Items	(20,898,107)	(14,024,274)
Cumulative effect on pr. yrs. (thru 12/31/75) of change in method of acctg. for trk. struc.		13,460,641
NET INCOME (LOSS)	$(20,093,107)	$ (563,633)

Certified Correct:

/s/ VICTOR C. BOHNE
Comptroller

Note: The Company's results of operations are included in Retained Income without adjustment which ultimately may result from Company's entry into reorganization under the Bankruptcy Act on March 17, 1975.

February 21, 1978

WILLIAM M. GIBBONS, TRUSTEE OF CHICAGO,
ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR

General Balance Sheet as of December 31, 1978

ASSETS

CURRENT ASSETS		
701—Cash		$ (4,617,086)
702—Temporary cash investments		21,102,305
703—Special deposits		2,154,321
705—Accounts Receivable; interline and other balances		—
706—Accounts Receivable; customers		14,873,402
707—Accounts Receivable; other		7,689,634
708—Interest and dividends receivable		32,161
708.5—Receivables from affiliated companies		247,834
709—Accrued accounts receivable		21,768,433
709.5—Allowance for uncollectible accounts		(125,000)
710—Working fund advances		129,346
711—Prepayments	$2,580,041	
Capitalized Equip leases; non-recourse	338,000	2,918,041
712—Material and supplies		16,238,531
713—Other current assets		485,401
Total Current Assets		$ 82,897,323
SPECIAL FUNDS		
715—Sinking Funds		$ —
716—Capital Funds		9,169,767
717—Insurance and other funds		—
Total Special Funds		$ 9,169,767
INVESTMENTS		
721—Investments and advances; Affiliated companies		$ 15,926,390

721.5—Adj; other investments and advances Affiliated Co's		(695,956)
722—Other investments and advances		1,154
Total Investments and Advances		$ 15,231,588
PROPERTIES		
731—Road and equipment property	$714,305,260	$ —
Capital equipment leases; non-recourse	121,523,000	$ 835,828,260
732—Improvements on leased property		3,683,026
Total Transportation Property		$ 839,511,286
733—Accumulated depreciation—imprvmt on leased prpty		$ (2,313,144)
735—Accumulated depreciation; Road and equipment	$(357,735,894)	—
Capitalized equipment leases; non-recourse	(43,370,000)	$(401,105,894)
736—Amortization of defense projects—road and equipment		(1,855,121)
Total Transportation Property Less Recorded Depreciation and Amortization		$ 434,237,127
737—Property used in other than carrier operations		4,477,271
738—Accumltd deprn; prpty used in other than carrier oprns.		(1,135,526)
Prpty used in other than carrier oprns less Recorded Depreciation		$ 3,341,745
Total Properties Less Recorded Depreciation and Amortization		$ 437,578,872
OTHER ASSETS AND DEFERRED CHARGES		
739—Organization Expenses		$ —
741—Other assets		8,233,008
743—Other deferred charges		5,348,180

Total Other Assets and Deferred Charges	$ 13,581,188
Total Assets	$ 558,458,738

( ) Denotes credit

Note: 1. In conformity with Order No. 42 issued by the United States District Court for the Northern District of Illinois—Eastern Division, No. 75B-2697, the following special deposits in trust for the United States were made on the dates shown:

Federal Withholding Tax	$1,353,678.82	December 13, 1978
Federal Retirement Tax	330,411.27	December 13, 1978
Federal Withholding Tax	1,246,193.49	December 28, 1978
Federal Retirement Tax	414,609.15	December 28, 1978
	$3,344,892.73	

WILLIAM M. GIBBONS, TRUSTEE OF CHICAGO,
ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR

Income Statement in Accordance with Regulations of the Interstate Commerce Commission

	DECEMBER 1976			
	Operations Exclusive of Rehabilitation Programs	Rehabilitation Programs	Total	1975
REVENUES				
Freight	$26,334,218	$ —	$26,334,218	$26,153,925
Passenger	376,687	—	376,687	460,350
Other	1,792,141	—	1,792,141	1,669,121
Railway Operating Revenues	28,503,046	—	28,503,046	28,283,396
EXPENSES				
M. of W. & S. Excl. Depreciation	4,106,986	1,852,108	5,959,094	5,031,621
Depreciation	230,455	—	230,455	227,534
M. of Equip. Excl. Depreciation	5,136,166	297,111	5,433,277	4,643,049
Depreciation	426,879	—	426,879	476,376
Traffic	598,338	—	598,338	608,989
Transportation	13,014,186	—	13,014,186	5,889,941
Dining Car Operations	32,165	—	32,165	35,552

Income Statement (continued)

	December 1976			
	Operations Exclusive of Rehabilitation Programs	Rehabilitation Programs	Total	1975
General	1,148,695	—	1,148,695	1,359,258
Railway Operating Expenses	24,693,870	2,149,219	26,843,089	18,272,320
NET REVENUE FROM RAILWAY OPERATIONS	3,809,176	(2,149,219)	1,659,957	10,011,076
RAILWAY TAX ACCRUALS (Excl. Income)				
General	80,581	—	80,581	238,349
Railroad Unemployment Insurance	182,556	20,656	203,212	147,940
Railroad Retirement	1,775,426	200,976	1,976,402	1,622,970
Total	2,038,563	221,632	2,260,195	2,009,259
RENTS—DEBIT BALANCE				
Equipment—Time and Mileage	689,764	—	689,764	494,139
Private Carline Mileage	711,011	—	711,011	582,635
Other	3,478,992	—	3,478,992	3,310,884
Joint Facility	199,860	—	199,860	178,496
Total Rents	5,079,627	—	5,079,627	4,566,154

NET RAILWAY OPERATING INCOME	(3,309,014)	(2,370,851)	(5,679,865)	3,435,663
Non-Operating Income	791,400	—	791,400	367,887
Equity in Earnings (Losses) of Affiliated Companies	126,253	—	126,253	(166,613)
Miscellaneous Deductions from Income	155,854	—	155,854	328,545
INCOME AVAILABLE FOR FIXED CHARGES	(2,547,215)	(2,370,851)	(4,918,066)	3,308,392
Fixed Charges	268,852	—	268,852	196,018
Contingent Interest	—	—	—	—
NET INCOME (LOSS)	$(2,816,067)	$(2,370,851)	$(5,186,918)	$ 3,112,374

Certified Correct:

/s/ VICTOR C. BOHNE
Comptroller

Notes:

1. The Company's results of operations are included in Retained Income without adjustment which ultimately may result from Company's entry into reorganization under the Bankruptcy Act on March 17, 1975.

2. Revaluation of assets as a result of possible permanent impairment and other adjustments which may be required as a result of examination and audit of the accounts are not reflected in this statement.

WILLIAM M. GIBBONS, TRUSTEE OF CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR

General Balance Sheet as of December 31, 1978

LIABILITIES

CURRENT LIABILITIES		
752—Accounts payable; interline and other balances		$ 4,425,074
753—Audited accounts and wages payable		9,375,478
754—Accounts payable; other		7,305,919
755—Interest and dividends payable	$ 777,552	
Capitalized equipment leases; non-recourse	1,351,000	$ 2,128,552
756—Dividends payable		—
757—Payables to affiliated companies		—
759—Accrued accounts payable		54,309,401
760—Federal income taxes accrued		—
761.5—Other taxes accrued		7,564,820
763—Other current liabilities		16,295,429
Total Current Liabilities		$101,404,673
LONG-TERM OBLIGATIONS DUE WITHIN ONE YEAR		
764—Equipment obligations	$1,088,981	
Capitalized equipment leases; non-recourse	6,575,000	$ 7,663,981
LONG-TERM DEBT		
765—Funded debt unmatured		$ —
766—Equipment obligations		1,287,919
766.5—Capitalized lease obligations		83,529,000
767—Receivers' and Trustees' Securities		21,091,993
768—Debt in default		100,462,028
769—Accounts payable; affiliated companies		1,313,180
770.1—Unamortized debt discount		—
Total Long-Term Debt		$207,684,120
RESERVES		
771—Accrued liability; pension and welfare		$ 809,245
772—Accrued liability; leased property		96,755

774—Accrued liability; casualty and other claims ..	12,087,620
Total Reserves	$ 12,993,620
OTHER LIABILITIES AND DEFERRED CREDITS	
781—Interest in default	$ 16,900,926
782—Other Liabilities	8,433,993
782—Other Liabilities (under reorganization proceedings)	
Incurred prior to reorganization	56,111,035
Incurred subsequent to reorganization	11,838,050
784—Other deferred credits	11,339,635
Total Other Liabilities and Deferred Credits	$104,623,639
SHAREHOLDERS' EQUITY	
791—Capital stock	$146,058,050
798—Retained income—unappropriated	(21,969,345)
Total Shareholders' Equity	$124,088,705
Total Liabilities and Shareholders' Equity	$558,458,738

Certified Correct:

/s/ Victor C. Bohne
Comptroller

Note: 1. The Company's results of operations are included in Retained Income without adjustment which ultimately may result from Company's entry into reorganization under the Bankruptcy Act on March 17, 1975. The obligation classified above as being in default are [*sic*] so classified only because on March 17, 1975, the company filed a petition seeking reorganization under the Bankruptcy Act, which action is defined as an event of default in the instruments under which the obligations were issued.

WILLIAM M. GIBBONS, TRUSTEE OF CHICAGO,
ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR
UNAUDITED

Preliminary General Balance Sheet as of December 31, 1979

ASSETS

CURRENT ASSETS		
701—Cash		$ (2,384,230)
702—Temporary cash investments		14,120,000
703—Special deposits		299,533
705—Accounts Receivable; interline and other balances		—
706—Accounts Receivable; customers		—
707—Accounts Receivable; other		7,722,847
708—Interest and dividends receivable		10,660
708.5—Receivables from affiliated companies		620,664
709—Accrued accounts receivable		80,208,879
709.5—Allowance for uncollectible accounts		(125,000)
710—Working fund advances		129,346
711—Prepayments	$111,026	
Capitalized Equip leases	—	111,026
712—Material and supplies		—
713—Other current assets		—
Total Current Assets		$ 100,713,725
SPECIAL FUNDS		
715—Sinking Funds		$ —
716—Capital Funds		10,849,481
717—Insurance and other funds		—
Total Special Funds		$ 10,849,481
INVESTMENTS		
721—Investments and advances; Affiliated companies		$ 15,993,350
721.5—Adj; other investments and advances Affiliated Co's		(968,215)
722—Other investments and advances		1,154
Total Investments and Advances		$ 15,026,289

PROPERTIES		
731—Road and equipment property	$721,271,141	$ —
Capitalized equipment leases	121,227,000	842,498,141
732—Improvements on leased property		3,682,413
Total Transportation Property		$ 846,180,554
733—Accumulated depreciation—imprvmt on leased prpty		$ (2,436,767)
735—Accumulated depreciation; Road and equipment	$(371,332,304)	
Capitalized equipment leases	(51,273,000	$(422,605,304)
736—Amortization of defense projects—road and equipment		(1,855,066)
Total Transportation Property Less Recorded Depreciation and Amortization		$ 419,283,417
737—Property used in other than carrier operations		4,479,249
738—Accumltd deprn; propty used in other than carrier oprns		(1,187,620)
Prpty used in other than carrier oprns less Recorded Depreciation		$ 3,291,629
Total Properties Less Recorded Depreciation and Amortization		$ 422,575,046
OTHER ASSETS AND DEFERRED CHARGES		
739—Organization Expenses		$ —
741—Other assets	$6,953,092	
Capitalized equipment leases	1,388,000	8,341,092
743—Other deferred charges		7,504,000
Total Other Assets and Deferred Charges		$ 15,845,092
Total Assets		$ 565,009,633

( ) Denotes credit

WILLIAM M. GIBBONS, TRUSTEE OF CHICAGO,
ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR
UNAUDITED

Preliminary General Balance Sheet as of December 31, 1979

LIABILITIES

CURRENT LIABILITIES		
752—Accounts payable; interline and other balances		$ 14,155,168
753—Audited Accounts and wages payable		1,654,062
754—Accounts payable; other		30,064,726
755—Interest and dividends payable	$2,092,047	
Capitalized equipment leases	1,250,000	3,342,047
756—Dividends payable		—
757—Payables to affiliated companies		—
759—Accrued accounts payable		66,705,563
760—Federal income taxes accrued		—
761.5—Other taxes accrued		2,253,654
763—Other current liabilities		2,214,560
Total Current Liabilities		$120,389,780
LONG-TERM OBLIGATIONS DUE WITHIN ONE YEAR		
764—Equipment obligations	$ 948,904	
Capitalized equipment leases	7,132,000	
Other Obligations	3,484,000	11,564,904
LONG-TERM DEBT		
765—Funded debt unmatured		$ —
766—Equipment obligations		1,107,165
766.5—Capitalized lease obligations		76,191,000
767—Receivers' and Trustees' Securities		35,865,992
768—Debt in default		100,462,028
769—Accounts payable; affiliated companies		1,210,416
Total Long-Term Debt		$214,836,601
RESERVES		
771—Accrued liability; pension and welfare		$ 929,245
772—Accrued liability; leased property		100,346
774—Accrued liability; casualty and other claims		12,730,516
Total Reserves		$ 13,760,107

OTHER LIABILITIES AND DEFERRED CREDITS	
781—Interest in default	$ 18,864,663
782—Other liabilities	16,730,904
782—Other liabilities (under reorganization proceedings)	
Incurred prior to reorganization	56,935,217
Incurred subsequent to reorganization	14,342,351
784—Other deferred credits	47,139,636
Total Other Liabilities and Deferred Credits	$154,012,771
SHAREHOLDERS' EQUITY	
791—Capital stock	$146,058,050
798—Retained income—unappropriated	(95,612,580)
Total Shareholders' Equity	$ 50,445,470
Total Liabilities and Shareholders' Equity	$565,009,633

Certified Correct:

/s/ VICTOR C. BOHNE
Comptroller

Notes: 1. The Company's results of operations are included in Retained Income without adjustment which ultimately may result from Company's entry into reorganization under the Bankruptcy Act on March 17, 1975. The obligation classified above as being in default are [*sic*] so classified only because on March 17, 1975, the company filed a petition seeking reorganization under the Bankruptcy Act, which action is defined as an event of default in the instruments under which the obligations were issued.

2. Adjustments normally made in year-end closing of accounts, revaluation of assets as a result of possible permanent impairment and other adjustments which may be required as a result of examination and audit of the accounts are not reflected in this statement.

3. The above statement was prepared without benefit of an agreement between the Trustee of the Chicago, Rock Island and Pacific Railroad Company and the Kansas City Terminal Company, Directed Rail Carrier for use of Trustee's property and/or costs of services rendered by the Directed Rail Carrier for the Trustee. Such items were included on an estimated basis and may be subsequently adjusted.

WILLIAM M. GIBBONS, TRUSTEE OF CHICAGO,
ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR

PRELIMINARY INCOME STATEMENT

UNAUDITED

	DECEMBER, 1979	DECEMBER, 1978
REVENUES		
Freight	$ 3,320,721	$27,326,020
Passenger	(340)	430,900
Other	595,477	2,007,748
Railway Operating Revenues	4,115,858	29,764,668
EXPENSES		
Way & Structures Excl. Depreciation	96,153	3,015,237
Way & Structures Depreciation	1,190,595	1,172,440
Equipment Excl. Depreciation	468,699	9,498,689
Equipment Depreciation	1,259,997	1,150,311
Transportation	1,212,719	16,523,330
General & Administrative	782,023	2,020,966
Railway Operating Expenses	5,010,186	33,380,973
NET REVENUES FROM RAILWAY OPERATIONS	(894,328)	(3,616,305)
Other Income	919,157	1,789,347
Equity in Earnings (Losses) of Affiltd. Co.	(82,158)	300,599
Miscellaneous Deductions from Income	684,005	325,114
INCOME AVAILABLE FOR FIXED CHARGES	(741,334)	(1,851,473)
Fixed Charges	1,483,129	1,365,145
Contingent Interest	—	—
NET INCOME (LOSS)	$(2,224,463)	$(3,216,618)

Certified Correct:

/s/ VICTOR C. BOHNE
Comptroller

Notes: 1. The Company's results of operations are included in Retained Income without adjustment which ultimately may result from Company's entry into reorganization under the Bankruptcy Act on March 17, 1975.

2. Adjustments normally made in year-end closing of accounts, revaluation of assets as a result of possible permanent impairment and other adjustments which may be required as a result of examination and audit of the accounts are not reflected in this statement.

3. In conformity with I.C.C. Order #36604 dated October 12, 1977, certain leased equipment acquired has been capitalized. The effect of this requirement results in adjustments increasing net loss for December, 1979 by $389,000 and increasing net loss for December, 1978 by $270,000.

4. Equipment expenses include programmed repairs made with funds borrowed under contract with the FRA and repairs made under shipper sponsorship loans. FRA repairs made after October 4, 1979 have been paid by the Kansas City Terminal Co. (D.R.C.) and accrued by the Trustee as an expense. FRA repairs in December, 1979 were $628,000 and $303,000 in the same month of 1978. No shipper sponsorship repairs were made in December, 1979 and $563,000 in December, 1978.

5. The above statement was prepared without benefit of an agreement between the Trustee of the Chicago, Rock Island and Pacific Railroad Company and the Kansas City Terminal Company, Directed Rail Carrier for use of Trustee's property and/or cases of services rendered by the Directed Rail Carrier for the Trustee. Such items were included on an estimated basis and may be subsequently adjusted.

March 31, 1980

WILLIAM M. GIBBONS, TRUSTEE OF CHICAGO,
ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR

General Balance Sheet as of December 31, 1980

UNAUDITED

ASSETS

CURRENT ASSETS	
Cash and temporary cash investments	$ 9,377,676
Accounts receivable	68,086,700
Inventories	5,755,264
Other	862,024
Total Current Assets	$ 84,081,664
INVESTMENTS AND RESTRICTED FUNDS	$ 98,751,006
PROPERTIES (Less Accumulated Depreciation)	$270,803,803
Other Assets and Deferred Charges	$ 7,481,377
Total Assets	$461,117,850

LIABILITIES

CURRENT LIABILITIES	
Accounts payable	$195,111,366
Taxes, Other Than Federal Income Tax	2,404,608
Long Term Debt, Due Within One Year	736,967
Total Current Liabilities	$198,252,941
LONG TERM DEBT	
Equipment	$ 397,540
Trustee Certificates	41,426,587
Total Long Term Debt	$ 41,824,127
PENSION, CASUALTIES AND OTHER LIABILITIES	$ 52,682,992
LIABILITIES, DEFERRED UNDER REORGANIZATION	
Debt in Default	$100,462,028
Interest in Default	20,825,349

Liabilities Incurred Prior to Reorganization	55,282,635
Liabilities Incurred Subsequent to Reorganization	17,438,890
Total Liabilities Deferred	$194,008,902
SHAREHOLDERS' EQUITY	$(25,651,112)
Total Liabilities and Shareholders' Equity	$461,117,850

Certified Correct:

/s/ VICTOR C. BOHNE
Comptroller

Notes: 1. The Company's results of operations are included in Retained Income without adjustment which ultimately may result from Company's entry into reorganization under the Bankruptcy Act on March 17, 1975. The obligation classified above as being in default are [*sic*] so classified only because March 17, 1975, the Company filed a petition seeking reon March 17, 1975, the Company filed a petition seeking reorganization under the Bankruptcy Act, which action is defined as an event of default in the instruments under which the obligations were adjusted.

2. Revaluation of assets which may occur as a result of the liquidation procedure and other adjustments which may be required as a result of examination and audit of the accounts are not reflected in this statement.

3. The above statement was prepared without benefit of an agreement between the Trustee of the Chicago, Rock Island and Pacific Railroad Company and the Kansas City Terminal Railway Company, Directed Rail Carrier for use of Trustee's property and/or costs of services rendered by the Directed Rail Carrier for the Trustee. Such items were included on an estimated basis and may be subsequently adjusted.

March 11, 1981

WILLIAM M. GIBBONS, TRUSTEE OF CHICAGO,
ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR

INCOME STATEMENT

UNAUDITED

	TWELVE MONTHS ENDED Dec. 31, 1980	Dec. 31, 1979
REVENUES		
Freight	$ (696)	$241,920,450
Passenger	589	3,808,450
Other	195,240	16,747,847
Railway Operating Revenues	195,133	262,476,747
EXPENSES		
Way & Structures Excl. Depreciation	1,333,191	29,007,312
Way & Structures Depreciation	13,710,304	14,179,919
Equipment Excl. Depreciation	4,543,348	113,718,708
Equipment Depreciation	11,393,563	14,133,550
Transportation	2,898,299	143,473,622
General & Administrative	15,564,033	27,020,489
Railway Operating Expenses	49,442,738	341,533,600
NET REVENUE FROM RAILWAY OPERATIONS	(49,247,605)	(79,056,853)
Other Income	21,077,686	6,704,883
Equity in Earnings (Losses) of Affiliated Companies	63,077	(273,765)
Miscellaneous Deductions from Income	414,367	4,354,490
INCOME AVAILABLE FOR FIXED CHARGES	(28,521,209)	(76,980,225)
Fixed Charges	14,621,992	16,879,871
Contingent Interest	—	—
NET INCOME (LOSS)	(43,143,201)	(93,860,096)
Effect of Adjustments for Items Applicable to 1979	(2,146,521)	
NET INCOME (LOSS) AFTER ADJUSTMENTS	$(45,289,722)	

Certified Correct:

/s/ VICTOR C. BOHNE
Comptroller

WILLIAM M. GIBBONS, TRUSTEE OF CHICAGO,
ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR

INCOME STATEMENT

	December 1978	Year 1978	Restated* 1977
REVENUES			
Freight	$27,326,020	$365,749,170	$337,037,478
Passenger	430,900	5,041,932	4,681,118
Other	2,007,748	20,824,396	21,252,621
Railway Operating Revenues	29,764,668	391,615,498	362,971,217
EXPENSES			
Way & Structures Excl. Depreciation	3,015,237	42,747,666	42,400,924
Way & Structures Excl. Depreciation	1,172,440	13,882,545	13,484,409
Equipment Excluding Depreciation	9,498,689	112,647,978	105,820,324
Equipment Excluding Depreciation	1,150,311	13,794,978	13,724,576
Transportation	16,523,330	184,644,221	173,963,061
General & Administrative	2,020,966	32,639,368	28,916,816
Railway Operating Expenses	33,380,973	400,356,756	378,310,110
NET REVENUE FROM RAILWAY OPERATIONS	(3,616,305)	(8,741,258)	(15,338,893)

Other Income	1,789,347	8,103,410	8,900,040
Equity in Earnings (Losses) of Affiltd. Cos. .	300,599	680,876	(1,194,837)
Miscellaneous Deduction from Income	325,114	1,348,359	754,610
INCOME AVAILABLE FOR FIXED CHARGES	(1,851,473)	(1,305,331)	(8,388,300)
Fixed Charges	1,365,145	15,872,671	16,011,807
Contingent Interest	—	—	—
NET INCOME (LOSS) (SEE NOTE)	$(3,216,618)	$(17,178,002)	$(24,400,107)

Certified Correct:
/s/ VICTOR C. BOHNE
Comptroller

• Restated to conform to 1978 accounting requirements.

Notes: 1. In November 1976 the Financial Accounting Standards Board issued its Statement No. 13 "Accounting for Leases" requiring leases meeting certain criteria to be capitalized. Retroactive accounting was optional for leases implemented prior to January 1, 1978. This rule was adopted by the Interstate Commerce Commission in their Order No. 36604 dated October 12, 1977. Subsequently, the Securities and Exchange Commission in their Accounting Series Release No. 225 made retroactive adjustment mandatory in statements for companies with fiscal years ending after December 24, 1978. Accordingly, the table below reflects the required adjustment included in the above figures.

LOSS BEFORE RETROACTIVE ADOPTION OF F.A.S. 13	$(2,946,368)	$(13,935,002)	$(20,093,107)
Increase in depreciation	(727,833)	(8,734,000)	(8,563,000)
Increase in interest	(1,014,667)	(12,176,000)	(12,691,000)
Decrease in rents	1,472,250	17,667,000	16,947,000
Net effect on loss	(270,250)	(3,243,000)	(4,307,000)
Loss for the period (after adjustments) as above	$(3,216,618)	$(17,178,002)	$(24,400,107)

2. The Company's results of operations are included in Retained Income without adjustment which ultimately may result from Company's entry into reorganization under the Bankruptcy Act on March 17, 1975.

3. Revaluation of assets as a result of possible permanent impairment and other adjustments which may be required as a result of examination and audit of the accounts are not reflected in this statement.

February 14, 1979

Notes:

1. The company's results of operations are included in Retained Income without adjustment which ultimately may result from company's entry into reorganization under the Bankruptcy Act on March 17, 1975.

2. Revaluation of assets which may occur as a result of the liquiadtion procedure and other adjustments which may be required as a result of examination and audit of the accounts are not reflected in this statement.

3. Effective with court-ordered liquidation in 1980, capitalization of long-term leases under ICC Order #36604 was no longer required. Accruals have been discontinued in August 1980. The effect of this requirement resulted in adjustments increasing net loss for the first seven months of 1980 by $2,889,000 and increasing net loss for the year of 1979 by $3,007,000.

4. The above statement was prepared without benefit of an agreement between the Trustee of the Chicago, Rock Island and Pacific Railroad Company and the Kansas City Terminal Company, Directed Rail Carrier, for use of Trusetee's property and/or costs of services rendered by Directed Rail Carrier for the Trustee. Such items were included on an estimated basis and may be subsequently adjusted.

5. The Trustee contests the compensation formula prescribed by the ICC for the use of the property by carriers, including the RTA, operating pursuant to Commission Directed Service Orders. Except for such carriers with which he has reached lease agreements and except for the KCT during its tenure, the Trustee has accrued rents for the DSO carriers based upon the Commission's Frisco formula of compensation. The Frisco formula orders have been appealed by the Trustee and the appeals are pending in the ICC and the U. S. Seventh Circuit Court of Appeals. Consequently, the Trustee contends that he is due an additional cumulative amount of $18,367,445, as well as past due rental from the KCT in an amount not yet determined.

March 11, 1981

Peat, Marwick, Mitchell & Co.
Report to the Reorganization Court
January 21, 1980

CHAPTER X: ANALYSIS

The Trustee's plan for the Rock Island Core System must be evaluated in terms of the economic attractiveness of the railroad, as presented in the Trustee's plan, the financial feasibility, as measured in terms of ability to pay obligations incurred, and the financial risk associated with uncertain future occurrences. Our analysis of the Core System focuses on profiles of these three key areas.

In preparing this report, PMM&Co. relied upon secondary information provided by the Rock Island Railroad, Creditors, Trustee, U.S. Government, Interstate Commerce Commission, and Association of American Railroads, without verifying such data. The achievement of any financial projections may be affected by possible fluctuating economic conditions and depends on the occurrence of future events, which cannot be assured. Therefore, actual results achieved may vary from the projections and such variations might be material.

This report is intended solely for the internal information of the Court, the Creditors, the Trustee, and the U.S. Department of Transportation. It is not to be referred to any other party for obtaining financing or for any other purpose.

This section presents our approach to the analysis of the Core System and the results of the analysis for four cases.

APPROACH

Our analysis of the Core System centered on complete economic and financial profiles of the Core System in four separate cases:

- Trustee's Core (corrected), incorporating the corrections described in earlier sections of this report;

- Trustee's Core (adjusted), incorporating alternative assumptions described in the earlier sections;
- Trustee's Core (adjusted), No Demand Traffic, incorporating the effects of eliminating "demand" traffic from the Core System's traffic base; and
- Trustee's Core (adjusted), No Demand Traffic and No Growth, incorporating the effects of operating the Core System with traffic that existed only in 1978.

Between the December 28, 1979, submission of the Trustee's plan and the preparation of this report, the Trustee prepared a revised income statement for the Core System based, in part, on the corrections and adjustments communicated to the Trustee in the course of our review. Because of the late date at which we received the revised plan (January 16, 1979) [*sic*], it was impossible to review the revisions and prepare complete profiles for a fifth case: Trustee's Revised Core. We did prepare the economic indicators of the Trustee's revised Core System without reviewing it. We did note that not all corrections and adjustments were incorporated.

Economic and Financial Profiles

The economic and financial indicators used in the analysis were:

- the cash flows generated by the Core System;
- the internal rate of return (IRR) provided by the net cash flows;
- the earnings before interest and taxes;
- the loan amounts required to finance the cash requirements of the Core; and
- the ability of the Core System to generate sufficient cash to repay its loans.

These indicators were developed using the economic analysis model prepared in Phase I and described in our Phase

I Report (attached as Appendix A) and a loan repayment model (described in Appendix B) prepared for this phase of the study.

Analyses were performed using both constant 1978 dollars and inflated dollars to permit a critical distinction to be made between the economic indicators and the financial indicators. Cash flows and IRR are most properly evaluated in terms of constant dollars, reflecting the real economic return of the Core System. Loan balances and payments are most properly evaluated in terms of inflated dollars, since principal payments and interest payments will actually be made with inflated dollars. Loan balances, reflecting cash requirements of the core, must similarly be stated in terms of the inflated dollar requirements for rehabilitation or other needs.

Revenue and Cost Inflation Rates

PMM&Co.'s financial analysis of the Rock Island Core System required the development and application of inflation rates for revenue and expense accounts to generate current dollar financial statements for the years 1980 through 1985. Separate inflation rates were developed for revenues, materials and wage expenses less fuel expenses, fuel expenses, and car hire expenses. Together, these inflation rates were applied to the revenue and expense accounts to develop current-dollar financial analysis statements for the Core System in 1980 through 1985. As indicated above, actual rates were used wherever possible to index the 1978 dollars to actual 1979 levels. The rates developed for this study are listed in Exhibit X-1. The basis for each of these rates is discussed below.

Revenue Inflation Rate

The inflation rate for revenue is based on the Price Indexes for Total Railroad Freight, produced monthly by the U.S. Department of Labor, Bureau of Labor Statistics. The actual rate for 1979—13.8 percent—was used to index the

1978 revenues to 1979 levels. For the period 1980-1985, a 10.3 percent inflation rate, compounded annually, was used. This rate was developed by generating a least-squares regression equation for the average annual indexes for the years 1973 to 1978. The resulting rate represents the slope of the log function used to model the time-series of revenue indexes.

Total Cost Inflation Rate

The inflation rates for railroad fuel, material, and supplies are based upon the Railroad Charge-Out Prices and Wages produced quarterly by the Economics and Finance Department of the Association of American Railroads. The indexes for all wages and material prices for between 1973 and 1978 were applied to a least-squares regression of a log function to develop an average overall annual inflation rate of 11.0 percent. A comparison of this inflation rate with that developed for revenues reveals that railroad revenues have historically lagged behind cost increases. To model this revenue lag, the 10.3 percent annual inflation rate was used for revenues after 1979. In the case of modeling revenues and expenses without a lag, the 11.0 percent annual inflation rate was used for revenues after 1979.

Total Cost Less Fuel Cost Inflation Rate

In recent years, fuel costs have demonstrated an independent behavior different from other railroad cost categories. To account for these differences, 2 sets of inflation rates were developed. The first was for costs excluding fuel, and the second was for costs of fuel alone. As described above, the actual cost indexes for 1978 and 1979 were used to identify the 1979 inflation rate for total costs less fuel costs. This was 10.6 percent in 1979. The component indexes for these costs for the years 1973-1978 were applied to a least-squares regression equation for a log function, whose slope provided the predicted inflation rate of 10.1 percent for the years 1980-1985.

EXHIBIT X-1

REVENUE AND COST INFLATION RATES
1979-1985

REVENUE AND COST CATEGORIES	ACTUAL 1979	PROJECTED 1980-1985
Revenues [1]	13.8%	10.3%
Materials and Wage Rates (Including Fuel) [2]	17.9%	11.0%
Materials and Wage Rates (Excluding Fuel) [2]	10.6%	10.1%
Fuel [2]	81.7%	20.8%
Car Hire [3]	25.1%	6.0%

SOURCES:

[1] U.S. Price Indexes for Total Railroad Freight; U.S. Department of Labor, Bureau of Labor Statistics.

[2] U.S. Indexes of Charge-Out Prices and Wage Rates; Economics and Finance Department, Association of American Railroads.

[3] Association of American Railroads.

Fuel Cost Inflation Rate

A similar process for fuel costs alone produced an actual inflation rate of 81.7 percent for the year 1979. The predicted inflation rate for the period 1980-1985 was 20.8 percent.

Car Hire Inflation Rate

Car hire is the final cost item that behaves sufficiently differently to warrant an independent inflation rate. The rate used for car hire was 25.1 percent for 1979, and 6.0 percent for the years 1980-1985. The 25.1 percent increase was based in part upon the one-time 18.0 percent increase in car hire rates allowed in 1979 under Ex Parte 334 by the Interstate Commerce Commission to permit the railroads to recover the increased costs of capital through the application of daily car-hire rates. This rate was compounded by the average 6.0 percent increase historically permitted by the ICC on an annual basis.

Loan Assumptions

The Trustee's plan states that the Core System can generate sufficient cash to fund all of its capital requirements. The ability of the Core System to become self-sustaining on a cash basis by 1985 was one major focus of this analysis.

The Trustee's plan for funding temporary cash shortfalls for initial working capital and other cash needs was tested by using medium-term debt with a 6-year term. Thus, the Core System was required to liquidate its temporary borrowings by the end of 1985.

The rate of interest for this debt was assumed to be 10 percent, approximately the rate FRA has required for recent Title V loan guarantees. This rate is far below the current prime rate.

Presentation Format

The results of each case analysis are summarized in the text and presented in detail at the end of this section. Exhibit X-2 presents a comparison of the items included in the summary tables, and the detailed computer runs prepared for each case are presented in Appendix C.

RESULTS OF ANALYSIS

Using the approach described above, we prepared economic and financial profiles of each of the four cases tested. The results of each case are discussed below.

EXHIBIT X-2

ROCK ISLAND CORE SYSTEM
CORRESPONDENCE OF LINE ITEMS

PMM&Co. Financial Analysis Line Items	Corresponding Line Items in Trustee's Income Statement
Capital Requirements	
Fixed Plant	Fixed Plant Rehabilitation
Rolling Stock	Locomotive Rehabilitation Car Rehabilitation Facility
Other	Working Capital Requirement
Revenues	
Freight	Freight Revenue Muscatine Coal Revenue
Demurrage	Demurrage
Switching	Switching
Joint Facilities (Net)	Joint Facility Expense Joint Facility Rents (Dr or Cr)
Car Rental	Car Rental Receivable Trailer Rental Receivable
Other Revenues	Passenger Revenues Grants and Subsidies Other Revenues
Operating Expenses	
Transportation	Transportation Operating Staff
Fuel Cost	Fuel Cost
Loss and Damage	Loss and Damage

PMM&Co. Financial Analysis Line Items	Corresponding Line Items in Trustee's Income Statement
Foreign Car Hire	Foreign Car Hire
Freight Car Leases	Freight Car Leases Trailer Leases
Locomotive Leases	Locomotive Leases
Other Expenses	
Maintenance of Way	Engineering Engineering Programs
Maintenance of Equipment	Mechanical Mechanical Programs
General	Finance General - Staff
Traffic	Marketing
Property Taxes	Railway Tax Accruals
Other	Passenger Services Expenses Other Expenses Fixed Charges
Depreciation and Non-Cash Charges	Depreciation Net Effect of Capitalized Leases
Amortizations	—
Nonoperating Cash Flow/Income	Earnings of Affiliated Cos.

* Amortization is calculated for the following items:

Trustee's Certificate #162
Trustee's Certificate #193
Claims for Equipment Rehabilitation
Claims for Track Work
Back Pay

Trustee's Core (Corrected)

As described in earlier sections, we corrected the plan as presented in the Trustee's submission of December 28, 1979. These corrections represent clerical and arithmetic errors as well as omissions of items. Detailed discussion of these corrections can be found in Sections II through IX of this report and are summarized in Exhibit X-3. The economic and financial profile of the Trustee's Core (corrected) is shown in Exhibit X-4.

The IRR of the Trustee's Core (corrected) is only relevant from an economic perspective for the constant dollar results obtained. This represents the real economic return of the capital required. For this case, the IRR was 23.7 percent. This indicates that the Core System has positive economic value. The IRRs for the inflated cases are not valid for comparison purposes since they are completely the product of the constant dollar IRR and the inflation assumptions used.

For loan repayment purposes, the inflated cases are the appropriate indicators of the degree to which the Core System can generate sufficient cash to fund its capital requirements. Under the assumption of no regulatory lag in revenues, the Core (corrected) appears to generate enough funds to liquidate the intermediate debt required over the first six years of operation. (However, it is noted that new capital debt should be incurred in 1986 and beyond.)

Under the assumption that regulatory lag in revenues will continue to exist, the ability of the Trustee's Core (corrected) to liquidate its debt is diminished. Under this assumption, $5.4 million of debt remains outstanding at the end of 1985.

Trustee's Core (Adjusted)

As described in earlier sections, the Trustee's Core (corrected) was adjusted by what we believe are more reason-

able assumptions from the operations, cost incurrence, mechanical, engineering, and freight car revenue point of view. These adjustments are summarized in Exhibit X-5. The economic and financial profile of the Trustee's Core (Adjusted) is shown in Exhibit X-6.

The IRR and loan repayment capability of this case are clearly unfavorable. The IRR in this case was less than zero percent. The more favorable "no lag" inflation assumption generates insufficient funds to meet the other capital requirements of the Core System. At the end of 1985, the system has $172 million in debt outstanding. The "lag" inflation assumption has $228 million in debt outstanding at the end of 1985.

EXHIBIT X-3

SUMMARY OF CORRECTIONS TO TRUSTEE'S PLAN OF 12-28-79

	Trustee's Plan 12-28-79		Trustee's Plan Corrected	
	1980	1985	1980	1985
Capital Requirements				
Fixed Plant	14,380	0	14,380	0
Rolling Stock	5,633	5,633	5,633	5,634
Other	20,000	0	20,000	0
Revenues				
Freight	168,621	205,958	168,431	205,726
Demurrage	2,799	3,352	2,799	3,352
Switching	4,427	4,427	4,427	4,427
Joint Facilities (Net)	—4,841	—5,578	—5,403	—5,578
Car Rental	60,953	44,007	59,289	42,843
Other Revenues	10,994	11,181	10,991	11,179
Operating Expenses				
Transportation	52,726	55,126	53,362	53,686
Fuel Cost	12,496	15,626	12,496	15,626
Loss & Damage	3,234	3,615	3,234	3,615
Foreign Car Hire	21,227	23,631	23,261	27,137
Freight Car Leases	35,641	36,382	36,679	37,402
Locomotive Leases	5,184	4,829	5,184	4,829
Other Expenses				
Maintenance of Way	24,359	24,046	24,359	24,046
Maintenance of Equipment	34,962	27,486	34,962	27,486
General	16,421	17,843	16,421	17,843
Traffic	6,071	6,071	6,071	6,071
Property Taxes	1,035	1,035	1,035	1,035
Other	5,646	7,122	11,491	9,841
Depreciation & Non-Cash Charges	9,206	8,351	6,708	5,867
Amortizations	0	0	—6,938	—2,733
Non-Operating Cash Flow/Income	681	681	681	681

EXHIBIT X-4

ROCK ISLAND TRUSTEE'S CORE PLAN
ASSUMING REGULATORY LAG IN REVENUES
(Dollars in Thousands)

CORRECTED

	Not Inflated		Inflated No Lag		Inflated Lag	
	1980	1985	1980	1985	1980	1985
ECONOMIC ANAYSIS:						
Capital Requirements	$ 40,013	$ 5,634	44,376	11,098	44,376	11,098
Revenues	240,534	261,949	307,529	542,479	306,080	524,952
Operating Expenses	134,216	142,295	166,280	295,094	166,280	295,094
Other Expenses	94,339	86,322	114,421	169,493	114,421	169,493
Operating Cash Flow	11,979	33,332	26,828	77,892	25,379	60,365
Amortizations	—6,938	—2,733	—6,938	—2,733	—6,938	—2,733
Non-Operating Cash Flow	681	681	829	1,342	829	1,342
NCF Before Interest and Taxes	5,722	31,280	20,719	76,501	19,270	58,974
Net Cash Flow	—34,291	25,646	—23,657	65,403	—25,106	47,876
Internal Rate of Returr	23.7	—	67.3	—	49.2	—

EXHIBIT X-5

SUMMARY OF ADJUSTMENTS TO CORRECTED TRUSTEE'S PLAN

	Trustee's Plan Adjusted		Trustee's Plan Corrected	
	1980	1985	1980	1985
Capital Requirements				
Fixed Plant	16,243	0	14,380	0
Rolling Stock	6,535	6,535	5,633	5,634
Other	20,000	0	20,000	0
Revenues				
Freight	168,383	202,317	168,431	205,726
Demurrage	2,799	3,352	2,799	3,352
Switching	4,427	4,427	4,427	4,427
Joint Facilities (Net)	—5,403	—5,578	—5,403	—5,578
Car Rental	56,790	35,612	59,289	42,843
Other Revenues	10,991	11,179	10,991	11,179
Operating Expenses				
Transportation	54,809	55,201	53,362	53,686
Fuel Cost	12,598	15,742	12,496	15,626
Loss & Damage	3,234	3,615	3,234	3,615
Foreign Car Hire	23,261	27,137	23,261	27,137
Freight Car Leases	36,679	41,086	36,679	37,402
Locomotive Leases	5,184	4,829	5,184	4,829
Other Expenses				
Maintenance of Way	30,562	30,562	24,359	24,046
Maintenance of Equipment	34,136	24,557	34,962	27,486
General	16,421	17,843	16,421	17,843
Traffic	6,071	6,071	6,071	6,071
Property Taxes	1,035	1,035	1,035	1,035
Other	11,569	9,919	11,491	9,841
Depreciation & Non-Cash Charges	6,708	5,867	6,708	5,867
Amortizations	—6,938	—2,733	—6,938	—2,733
Non-Operating Cash Flow/Income	681	681	681	681

Both inflation assumptions indicate that the Trustee's Core (Adjusted) will require additional debt to repay start-up rehabilitation and working capital debt as well as funding continuing capital programs.

Lower Traffic Cases

The analysis of the first two cases describes the economic and financial profiles of the Trustee's Core under differing assumptions but with the same optimistic traffic level. If the Core System does not achieve the traffic levels forecast in Section II, the Core as described in the Trustee's plan cannot achieve financial viability; it continues to require borrowing not only to refund past debt and fund new capital requirements but also to cover its operating deficits.

Exhibits X-7 and X-8 present the economic and financial profiles of lower traffic cases at successively lower traffic levels. It is interesting to note that the lowest traffic case exhibits slightly better economic and financial performance than the intermediate traffic case. This apparent contradiction is due directly to the additive effect of increased car rental income.

Trustee's Core (Revised)

Exhibit X-9 presents the Trustee's Core as revised in his errata sheets received January 16, 1980. We present these strictly for the information of the Court. We have neither reviewed the notes for errors nor evaluated the underlying assumptions of this revised plan.

• • •

This report reflects our economic and financial analysis of the Core System. PMM&Co. was not requested to evaluate the labor protection payments that may result from contracting to a Core System. Similarly, we were not requested to evaluate the public good associated with continued public financial support of the Core System.

EXHIBIT X-9

TRUSTEE'S CORE ERRATA SHEETS

	Not Inflated	
	1980	1985
ECONOMIC ANALYSIS:		
Capital Requirements	40,013	5,634
Revenues	241,646	261,988
Operating Expenses	133,230	140,177
Other Expenses	92,153	81,880
Operating Cash Flow	16,263	39,931
Amortizations	—6,938	—2,773
Non-Operating Cash Flow	681	681
NCF Before Interest and Taxes	10,006	37,879
Net Cash Flow	—30,007	32,245
Internal Rate of Return	32.5	—
FINANCIAL ANALYSIS:		
Depreciation and Noncash Charges	7,082	6,227
Total Expenses	232,465	228,284
Operating Income	9,181	33,704
Non-Operating Income	681	681
Earnings Before Financing and Taxes	9,862	34,385
LOAN REPAYMENT:		
Beginning Balance	0	58,109
Ending Balance	34,827	32,239
Loan Payment Required (Principal and Interest)	9,187	64,484
Coverage Ratio	1,089	.587

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 B 2697

In Proceedings for the Reorganization of a Railroad

In the Matter of:

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,
Debtor.

RESPONSE OF INTERVENORS CROWN ET AL. TO TRUSTEE'S REPORT FOR 1978 AND FOUR MONTHS 1979

ALBERT E. JENNER, JR.
DANIEL R. MURRAY
CARTER H. KLEIN
LINDA H. MULLENBACH
JENNER & BLOCK
One IBM Plaza
Room 4400
Chicago, Illinois 60611
312/222-9350

September 6, 1979

• • •

B. EARNINGS

The second criterion on which we must judge the Rock Island's performance is its earnings. Last September, Mr. Manos represented to the Court that:

> "we are close, now—close as we have been in the three and a half years of this reorganization—to the formulation and filing of a plan. I state that with confidence."

(Tr. Sept. 18, 1978, at p.5.)

The basis for Mr. Manos' confidence was the upturn in carloadings and profitability he discerned in the summer

and fall of 1978. In order to test that confidence, we must look to the earnings record of the Rock Island in 1978 and subsequently in 1979. Specifically, we must view that record from three different perspectives:

(1) in the light of the Rock Island's prior history of earnings,

(2) in light of the earnings of other railroads, and

(3) in light of the Trustee's own forecasts.

From all three perspectives, the magnitude of the Rock Island's losses in 1978 and the first half of 1979 is staggering. Those losses prove conclusively that the Rock Island is not reorganizable on an income basis.

(1) *The Rock Island's earnings history.*

Last September, Mr. Manos made the following representations to the Court:

"What I am saying, your Honor, is that our act was in place—if it wasn't for that hard winter [1977-1978], I don't believe that we would even have, at this moment, the accumulated deficit through July of eleven or twelve million—I think it's less—it's eleven million now, it's going down. *However, since then, the Rock Island has dramatically reversed the trend.* In May, it had a profit, on a fully accrued basis of $234,000—that's a black bottom line.

"How did we do it? We had carloads of 66,887 cars versus 65,540 in 1977, when we lost a small amount—$225,000.

"In June, the Rock Island had a profit of $1,070,000, on a fully accrued basis; and it did it with 68,086 cars, an increase over 1977, when we had 65,295 cars.

"In July, w had a small loss of less than a half a million dollars; but there we had the loss because our car-

loadings went down a little bit to 60,025 cars as against 62,407 in 1977. But it proved a point that when we go below a certain figure on monthly carloads, we have a small loss. *But I say to your Honor that we are going to have consistant [sic] months, now, in profitability* of over 65,000 carloads per month. *That is going to be the pattern, in my opinion*—I'm cautiously optimistic about that from here on in."

(Tr. Sept. 18, 1978, at pp. 16-17) (Emphasis added). Mr. Manos repeated and strengthened that pledge later in his report:

> *"No way is the Rock Island going to lose twenty or $22,000,000 annually from here on in—it's not going to happen.* It happened in the first six months, but it's not going to happen in the last half of 1978, your Honor, I assure you."

(Tr. Sept. 18, 1978, at p. 101) (Emphasis added).

Unfortunately, Mr. Manos' confidence was misplaced. Table X displays the monthly losses of the Rock Island in 1978.

TABLE X

ROCK ISLAND NET INCOME (LOSS)

1978

(in millions of dollars)

	ICC Basis	Rock Island's Depreciation Basis
January	(3.8)	(3.9)
February	(4.8)	(5.6)
March	(.6)	(1.7)
April	(1.5)	(1.6)
May	(.2)	.2
June	.4	1.1
July	(.5)	.5
August	.5	.5
September	(.5)	.8
October	.4	1.4
November	(2.7)	(2.1)
December	(3.6)	(3.2)

The Rock Island did break slightly into the black in the summer and early fall—traditionally its best months. But the familiar pattern of losses resumed in November—*with a vengeance.* As a result, in 1978 after year-end adjustments, the Rock Island lost $21.2 million on an ICC accounting basis and $17.9 million on the Trustee's own depreciation accounting basis. These figures would have been much larger had the Trustee paid his employees the national wage scale *and* properly maintained his physical plant.

Current losses of the Rock Island are the largest it has ever experienced in its 105 year history. This is so even though the losses represent the experience of only six months, as shown by Table XI below.

FINANCIAL ANALYSIS:						
Depreciation and Noncash Charges	6,708	5,867	6,708	5,867	6,708	5,867
Total Expenses	233,263	234,484	287,409	470,454	287,409	470,454
Operating Income	5,271	27,465	20,120	72,025	18,671	54,498
Non-Operating Income	681	681	829	1,342	829	1,342
Earnings Before Financing and Taxes	5,952	28,146	20,949	73,367	19,500	55,840
LOAN REPAYMENT:						
Beginning Balance	0	84,874	0	29,268	0	40,318
Ending Balance	38,292	68,279	38,625	0	38,625	5,405
Loan Payment Required (Principal and Interest)	9,187	93,925	10,189	32,194	10,189	44,890
Coverage Ratio	.622	.333	2.033	2.376	1.891	1.313

EXHIBIT X-6

ROCK ISLAND TRUSTEE'S CORE PLAN
ASSUMING REGULATORY LAG IN REVENUES
(Dollars in Thousands)

ADJUSTED

	Not Inflated		Inflated No Lag		Inflated Lag	
	1980	1985	1980	1985	1980	1985
ECONOMIC ANALYSIS:						
Capital Requirements	42,778	6,535	47,744	12,874	47,744	12,874
Revenues	237,987	251,309	304,156	522,394	302,707	505,140
Operating Expenses	135,765	147,610	171,056	310,995	171,056	310,995
Other Expenses	99,794	89,987	121,066	176,713	121,066	176,713
Operating Cash Flow	2,428	13,712	12,034	34,686	10,585	17,432
Amortizations	—6,938	—2,733	—6,938	—2,733	—6,938	—2,733
Non-Operating Cash Flow	681	681	829	1,342	829	1,342
NCF Before Interest and Taxes	—3,829	11,660	5,925	33,295	4,476	16,041
Net Cash Flow	—46,607	5,125	—41,819	20,421	—43,268	3,167
Internal Rate of Return	•	—	12.2	—	•	—

• Less than zero.

FINANCIAL ANALYSIS:						
Depreciation and Noncash Charges	6,708	5,867	6,708	5,867	6,708	5,867
Total Expenses	242,267	243,464	298,830	493,575	298,830	493,575
Operating Income	—4,280	7,845	5,326	28,819	3,877	11,565
Non-Operating Income	681	681	829	1,342	829	1,342
Earnings Before Financing and Taxes	—3,599	8,526	6,155	30,161	4,706	12,907
LOAN REPAYMENT:						
Beginning Balance	0	185,248	0	173,526	0	209,014
Ending Balance	51,076	199,302	46,593	171,745	48,042	228,036
Loan Payment Required (Principal and Interest)	9,822	204,427	10,962	192,166	10,962	231,203
Coverage Ratio	—.389	.057	.54	.173	.408	.069

EXHIBIT X-7

ROCK ISLAND TRUSTEE'S CORE (ADJUSTED)
NO DEMAND TRAFFIC
(Dollars in Thousands)

NO DEMAND

	Not Inflated		Inflated No Lag		Inflated Lag	
	1980	1985	1980	1985	1980	1985
ECONOMIC ANALYSIS:						
Capital Requirements	42,778	6,535	47,744	12,874	47,744	12,874
Revenues	222,003	230,218	283,820	473,990	282,660	459,815
Operating Expenses	128,118	136,868	160,121	295,887	160,121	295,887
Other Expenses	99,746	89,943	121,008	176,627	121,008	176,627
Operating Cash Flow	—5,861	3,407	2,691	1,476	1,531	—12,699
Amortizations	—6,938	—2,733	—6,938	—2,733	—6,938	—2,733
Non-Operating Cash Flow	681	681	829	1,342	829	1,342
NCF Before Interest and Taxes	—12,118	1,355	—3,418	85	—4,578	—14,090
Net Cash Flow	54,896	—5,180	51,162	—12,789	—52,322	—26,964
Internal Rate of Return	•	—	•	—	•	—

• Less than zero.

FINANCIAL ANALYSIS:						
Depreciation and Noncash Charges	6,708	3,867	6,708	5,867	6,708	5,867
Total Expenses	234,572	230,678	287,837	478,381	287,837	478,381
Operating Income	—12,569	—460	—4,017	—4,391	—5,177	—18,566
Non-Operating Income	681	681	829	1,342	829	1,342
Earnings Before Financing and Taxes	—11,888	221	—3,188	—3,049	—4,348	—17,224
LOAN REPAYMENT:						
Beginning Balance	0	243,153	0	282,258	0	312,464
Ending Balance	59,780	273,301	56,107	324,560	57,325	372,666
Loan Payment Required (Principal and Interest)	9,822	268,121	10,962	311,771	10,962	344,998
Coverage Ratio	—1.233	.005	—.311	0	—.417	—.040

EXHIBIT X-8

ROCK ISLAND TRUSTEE'S CORE (ADJUSTED)
NO DEMAND TRAFFIC NO GROWTH—INCLUDING COAL TRAFFIC
(Dollars in Thousands)

ADJUSTED

	Not Inflated		Inflated No Lag		Inflated Lag	
	1980	1985	1980	1985	1980	1985
ECONOMIC ANALYSIS:						
Capital Requirements	42,778	6,535	47,744	12,874	47,744	12,874
Revenues	222,003	223,568	283,822	452,129	282,660	440,188
Operating Expenses	128,118	124,793	160,121	264,236	160,121	264,236
Other Expenses	99,746	89,863	121,008	176,469	121,008	176,469
Operating Cash Flow	—5,861	8,912	2,693	11,424	1,531	—517
Amortizations	—6,938	—2,733	—6,938	—2,733	—6,938	—2,733
Non-Operating Cash Flow	681	681	829	1,342	829	1,342
NCF Before Interest and Taxes	—12,118	6,860	—3,416	10,033	—4,578	—1,908
Net Cash Flow	—54,896	325	—51,160	—2,841	—52,322	—14,782
Internal Rate of Return	•	—	•	—	•	—

• Less than zero.

FINANCIAL ANALYSIS:						
Depreciation and Noncash Charges	6,708	3,867	6,708	3,867	6,708	3,867
Total Expenses	234,572	218,523	287,837	444,572	287,837	444,572
Operating Income	—12,569	5,045	—4,015	7,557	—5,177	—4,384
Non-Operating Income	681	681	829	1,342	829	1,342
Earnings Before Financing and Taxes	—11,888	5,726	—3,186	8,899	—4,348	—3,042
LOAN REPAYMENT:						
Beginning Balance	0	229,144	0	255,577	0	282,813
Ending Balance	59,780	252,387	56,105	285,263	57,325	327,259
Loan Payment Required (Principal and Interest)	9,822	252,712	10,962	282,422	10,962	312,382
Coverage Ratio	—1.233	0.027	—0.311	0.035	—0.417	—0.006

TABLE XI

ROCK ISLAND LOSSES

January-June, 1979

(in millions of dollars)

	ICC Basis	Depreciation Basis
January	(8.6)	(9.1)
February	(10.5)	(11.4)
March	(9.6)	(10.2)
April	(5.9)	(6.0)
May	(5.7)	(6.0)
June	(4.6)	(4.0)
Total	(45.1)	(46.7)

Although the Trustee blames the severe winter for his losses, that reason fails to explain why losses are so great in the months of March, April, May and June, months which customarily benefit from revenue traffic that could not be hauled earlier because of the winter. Where are the benefits of the new locomotive power? Where are the benefits of the thousands of new and rehabilitated cars that the Trustee has prevailed upon the Court to obtain? Where are the benefits of the Trustee's much touted rehabilitation and marketing efforts? Translated into earnings, they are nowhere to be seen.

The Trustee's insistence upon a traditional income based reorganization of the Rock Island is frightening because of the Rock Island's consistent pattern of losses since 1965—a period approaching 15 years. *The magnitude of those losses now exceeds a staggering quarter of a billion dollars.* Over sixty percent of that sum, $157.3 million, has been incurred in the post-reorganization years from 1975 through June, 1979.

Yearly losses, particularly since 1974, have accelerated, as shown by Table XII below:

TABLE XII

ROCK ISLAND NET LOSSES

1965-1979

ICC Accounting

(in millions of dollars)

Year	Net Loss
1965	(1.5)
1966	(3.6)
1967	(16.7)
1968	(4.8)
1969	(9.8)
1970	(16.6)
1971	(6.4)
1972	(5.9)
1973	(15.0)
1974	(23.1)
1975	(31.2)
1976	(25.0)
1977	(34.8)
1978	(21.2)
1979*	(45.1)
Total	($260.7)

* Six months only.

Another informative, historical comparison of earnings that demonstrates the accelerated losses of the Rock Island comes from page four of the Trustee's Report for the Rock Island for 1976. Compared in that Report are the Rock Island's earnings for the five-year period 1972-1976 on the Trustee's own depreciation accounting basis. The Trustee's

comparisons show, amazingly, that instead of a loss, in 1972, the Rock Island operated at a profit, and that losses in pre-reorganization years were less than they would be on an ICC accounting basis, as demonstrated in Table XIII below. (This calls into serious question the Trustee's statements that under prior management the Rock Island was undermaintained in pre-reorganization periods, or, *more likely*, shows that the depreciation method of accounting is an unreliable indicator of proper maintenance levels.)

TABLE XIII

ROCK ISLAND NET INCOME (LOSS)

1972-1979

(in millions of dollars)

Year	Depreciation	ICC
1972	1.5	(5.9)
1973	(13.5)	(15.0)
1974	(17.5)	(23.1)
1975	(25.0)	(31.2)
1976	(14.0)	(25.0)
1977	(24.4)	(34.8)
1978	(17.2)	(21.2)
1979*	(46.7)	(45.6)

*Six months only.

The Trustee's Report describes 1978 as a "pivotal" year for the Rock Island—another way of saying that in 1978 the Rock Island "turned the corner." Trustee's Report, p. 5. One might ask pivotal to what? The Trustee presumably finds solace in the fact that the Trustee had smaller losses in 1978 than in 1977. But the same could have been said about 1976, because it too was preceded by a year with larger losses. 1976, however, was followed by a year with greater losses—a cycle the Rock Island will obviously

duplicate in 1979. In any event, it is inconceivable how the Trustee can take solace in losses ranging from $17 to $21 million (depending on the method of accounting).

Nevertheless, a comparison of the Trustee's "pivotal" year 1978 with 1976 might be instructive to ascertain if any real progress has been made in these proceedings in that two-year period. The Rock Island fared about the same income-wise in 1978 as it did in 1976, as Table XIV below shows. The table also reveals, however, that from an operations standpoint, the Rock Island fared much worse in 1978 than it did in 1976.

TABLE XIV

ROCK ISLAND INCOME PERFORMANCE

1978 VS. 1976

(depreciation basis)

(in thousands of dollars)

	1978	1976
Revenues	391,615	341,320
Expenses	409,290	355,412
Net Railway Operating Income	(17,675)	(14,092)
Income Available for Fixed Charges	(10,239)	(11,357)
Net Income (Loss) (without capitalization of leases)	(13,935)	(13,857)

Table XIV shows that 1978 was, if anything, *a significantly worse year than 1976*, as far as income generated from operations is concerned. In 1976 the Rock Island suffered net railway operating losses of $14.1 million compared with $17.7 million for 1978, or $3.6 million worse in 1978. Thus, operating losses were 25% greater in 1978 than

they were in 1976, using the Trustee's own depreciation method of accounting. It was only because the Trustee received $7.4 million in nonoperating income and other nonoperating credits compared with $2.7 million in 1976, that the Trustee was able to generate negative income for fixed charges and net losses in 1978 no worse than that of 1976.

(2) *Comparison with other railroads.*

At the status report last September, Mr. Manos asserted that the Rock Island's heavy losses in the winter months were no different from the losses experienced by other railroads:

> "Your Honor, I repeat that the first four months were a loss—we lost 12.8 million through April—there was a reason for that. There was a very heavy winter [1977-78], as you recall, your Honor. This is not something that the Rock Island experienced alone; this is something that all of the railroads experienced."

(Tr. Sept. 18, 1978, at pp. 15-16.)

An examination of the reports rendered by other railroads reveals Mr. Manos' argument to be incorrect, with respect not only to 1978 but also to the first half of 1979.

Compared with its competitors, many of which experienced the same winter, Rock Island's earnings performance leaves it next to the bottom of the list for the first half of 1979.

Table XV shows the earnings of the Western District railroads, as well as the Illinois Central, the Norfolk & Western and the Elgin Joliet & Eastern (railroads which compete in the Western District but are not classified as Western District railroads).

TABLE XV

EARNINGS

First Half 1979

(in millions of dollars)

BN	109.0
N&W	100.8
UP	81.1
ATSF	61.3
SP	60.0
MP	53.3
SSW	25.6
DRGW	13.9
EJ&E	11.8
C&S	10.1
KCS	9.0
SLSF	8.0
Soo	7.8
FWD	7.2
DMIR	3.2
MKT	(0.4)
ICG	(8.4)
CNW	(38.1)
RI	(45.0)
CMSt.P	(59.1)

Source: ICC RE&I

The Rock Island's performance ranks ahead only of the seriously troubled bankrupt Milwaukee.

Reading the Trustee's Report, one is left (surface wise) with the impression that 1978 was a banner year for the Rock Island.

But how does it compare with its competitors in earnings? It was second to last, aheead only of the Milwaukee, as Table XVI shows:

TABLE XVI

NET INCOME (LOSS) 1978

(in millions of dollars)

N&W	165.2
UP	141.8
BN	113.6
MP	101.9
ATSF	92.5
SP	55.9
SSW	32.9
DRGW	24.5
Soo	23.3
SLSF	20.6
EJ&E	15.0
KCS	14.4
DMIR	6.3
FWD	5.8
WP*	5.5
C&S	3.4
MKT	2.4
ICG	(2.0)
CNW	(15.9)
RI	(21.2)
CMSt.P	(65.2)

Source: ICC RE&I

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* Excludes extraordinary item of $115,561,000. In short, the Trustee can find no solace in a comparison of his net losses with the performance of other railroads.

(3) *Comparison with Trustee's forecasts.*

The Trustee's Report attempts to impeach the FRA study of the Rock Island because it predicted $29.5 million in Rock Island losses in 1978 and actual losses were only $18 million. Trustee's Report, p. 5.

What the Trustee overlooks is that had he paid the national wage scale retroactive to January 1, 1978, as did all other railroads, the Trustee would have incurred $6-8 million in additional operating expenses because of increased labor costs. In addition, the FRA study assumed normalized maintenance expenditures for the Rock Island. The Rock Island, however, was dramatically undermaintained in 1978.[1] Allowing for these variables the FRA study was quite accurate. As for 1979, net losses predicted by the FRA will *understate* actual Rock Island losses by many millions of dollars.

If stones are to be cast at forecasters, the Trustee's own glass house is extremely vulnerable. We need only recall the following statements of the President of the Rock Island, Mr. Ingram, solemnly presented *under oath* to the Court and creditors to justify the borrowing of millions of dollars at the expense of creditors:

> "Good marketing will add $150 million to the *net* income of the railroad over a three-year development period. The annual rate of improvement at the end of the third year should be between $60 and $70 million." (Emphasis added.) Direct Testimony of Trustee's Witness John W. Ingram, p. 2 of Direct Testimony of Trustee's Petition for Authority to Issue Trustee's Certificates (Oct. 15, 1975) (hereinafter "ERSA Testimony").
>
> "John D. Mitros has been hired to eliminate surplus personnel and tighten management practices. Good progress has been made in this area. *It will add an*

[1] See pages 41-49, *infra*.

estimated $50 million annually to the net income of the railroad after a three-year program of improvement." *Id.* at 2.

"As we make further progress we will, in a reasonably short period of time, be fully viable even at current economic levels." *Id.* at 4.

"Revenues will increase more quickly than expenses and the ability of Rock Island to internally generate capital will be substantially greater than it has been since the 1950's." *Id.* at 4.

In 1976-77, the Trustee and his staff submitted forecasts to the FRA and the creditors in support of a proposed capital budget of $160 million. *Those forecasts proved so unreliable that even the Trustee's own personnel found them incredible and they were withdrawn* within months after they were submitted.

The Trustee's most recent forecast of earnings, submitted at the end of 1977 to the FRA and creditors, Base Case I, is likewise already obsolete.

An analysis of Base Case I underscores the unreliability and excessive optimism of the Trustee's forecasts. This forecast is the third and latest generated by the Trustee; each successive forecast revised downward traffic and hence revenues. Table XVII compares the Trustee's forecast in Base Case I with actual results.

TABLE XVII

ACTUAL vs. FORECASTED INCOME STATEMENT 1978

(in thousands of dollars)

	Forecasted	Actual	Difference	Favorable (Unfav.) Percentage
Total Revenues	416,685	391,616	(25,069)	(6.0)
Operating Expenses	318,367	315,183	3,184	1.0
Net Revenue	98,318	76,433	(21,885)	(22.2)
Tax Accruals	5,294	4,726	568	10.7
Rents	64,321	66,209	(1,888)	(2.9)
Net Railway Operating Income	28,703	5,498	(23,205)	(80.8)
Engineering and Mechanical Programs	32,532	34,493	(1,961)	(6.5)
Net Income (Loss)	306	(21,162)	(21,468)	(infinite)

Table XVII reveals that while revenues fell short of prediction by $25.1 million or 6%, operating expenses were only $3.2 million or one percent less than predicted. This largely contributed to a net railway operating income[3] shortfall of $23.2 million or 80.8% and a net income shortfall of $21.5 million. *The slight profit projected became a huge loss.* Moreover, these significant shortfalls in actual

[3] The Trustee's management income statement excludes from operating expense "programs" for mechanical and engineering expenses which normally would be included as operating expenses.

earnings occurred in the twelve months immediately following the month in which the forecasts were presented, further impeaching the credibility of the Trustee's entire forecasting process.

In summary, then, we find that Mr. Manos' predictions of an upturn in the earning power of the Rock Island, as with his predictions concerning carloadings, have proven completely mistaken. Since the fall of 1978, the Rock Island's record of net losses is an unmitigated catastrophe.

Since September, 1978, when Mr. Manos made his prediction that the Rock Island had "turned the corner," the Trustee has reported net losses totalling $51.5 million on an ICC basis and $49.8 million on the Trustee's own depreciation accounting basis. The breakeven months of the summer and early fall of 1978 have proven to be not only a "flash in the pan" but the "calm before the storm."

The Trustee thus has failed to rebut the presumption established by the creditors at the September 18, 1978 status report that the Rock Island is not reorganizable on a traditional income or other basis.

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D. NET WORKING CAPITAL

One of the indicators of the state of health of a business is its net working capital position. Net working capital is the difference between short term assets and short term liabilities and other liabilities coming due within the year. It is a reliable indicator which shows whether the business is able to operate without resort to hand to mouth practices, juggling payables, and straining to meet current expenses by running down current assets and building up current liabilities.

During the course of the Trustee's administration, the working capital position of the railroad has deteriorated steadily, *significantly and alarmingly*. Table XXIII traces

the changes in the Rock Island's working capital position from December 31, 1973 through June 30, 1979.

TABLE XXIII

NET WORKING CAPITAL 1973-1979

(in millions of dollars)

	Net Working Capital (Deficit)
December 31, 1973	(25.8)
December 31, 1974	(26.0)
March 16, 1975	20.2
December 31, 1975	16.6
December 31, 1976	7.8
December 31, 1977	(9.7)
December 31, 1978	(26.2)
January 31, 1979	(33.1)
February 28, 1979	(41.4)
March 31, 1979	(48.0)
April 30, 1979	(50.4)
May 31, 1979	(52.4)
June 30, 1979	(52.2)

From 1973 to 1974, the railroad's working capital deteriorated in the amount of $250,000. Because of the reclassification of current liabilities to deferred liabilities as a result of the filing of the reorganization petition, the working capital position of the railroad improved by $46.2 million between December 31, 1974 and March 17, 1975. The Trustee was thus able to start his trusteeship with a substantial positive net working capital position of $20.2 million. Unfortunately, from March 17, 1975 to December 31, 1975, net working capital decreased by $3.7 million at a rate of 14.6 times that of 1974. During 1976 working capital deteriorated by $8.8 million or at a rate of 35 times the rate of deterioration of 1974. After December 31, 1976, net work-

ing capital dropped by $17.5 million, turning a positive $7.8 million to a deficit of $9.7 million. In 1978, the net working capital deficit increased by $16.5 million to $26.2 million, although part of the additional deficit resulted from capitalization of financing leases in accordance with newly adopted accounting procedures.

Despite the influx of millions in Federal funding, the Rock Island net working capital deficit doubled in the first six months of 1979. The deficit increased from an already huge $26.2 million to an incredible $52.2 million. It is little wonder that the Trustee's cash reserves are all but depleted in mid-summer, traditionally the Rock Island's most prosperous season of the year.

The Rock Island net working capital deficit even exceeds that of the bankrupt Milwaukee Road. At the end of the first quarter of 1979, the Milwaukee's net working capital deficit stood at $32.1 million compared to the Rock Island's deficit of $48.3 million, a difference of $16.2 million. Similarly, the Rock Island's increase in its net working capital deficit rivaled that of the Milwaukee for the 12-month period ending March 31, 1979. The Rock Island's deficit increased by $33.8 million, the Milwaukee's by $33.4 million, while the net working capital of 17 Western District railroads (including the Rock Island and the Milwaukee), and the N & W, EJE and ICG decreased on the average by only $4.25 million.

E. DETERIORATION IN CASH RESERVES

Rivaling its deterioration in net working capital is the Rock Island's deterioration in its cash reserves. For the first time in these proceedings, the Trustee's ability to meet his payroll became sufficiently in doubt that he sought authority to invade the escrow funds in late March of this year. Just when creditors were beginning to feel relieved because the authority was not exercised, the Trustee made a second request on June 27, 1979 for authority to invade

the escrow funds to meet the end of the month payroll. This request was not made during a severe winter or spring flooding. It came in late June when traffic flows should have been normalized and cash flows restored.

This second cash request, more than any other factor, demonstrates how close the Trustee, the creditors and shareholders, not to mention the public interest, are to the precipice. *Indeed,* the Rock Island is alive and gasping today not because of any ability to generate capital on its own, but by reason of RTA, shipper, State, ERSA, § 505 and § 511 4-R Act funding, the deferral of fixed and prepetition charges under § 77 of the Bankruptcy Act, and the payment of substandard union wage scales.

Creditors were amazed to learn in discussions with the Trustee's staff on the car leasing program on April 9, 1979 that the Rock Island, presumably for reasons of cash conservation, was not spending any of its internally generated funds in 1978 to repair rolling stock either before or after it received funding under the $33 million FRA § 511 car repair program. Instead, the Rock Island was relying solely on shipper sponsorship funds. *Little wonder that the Rock Island has maintained a huge inventory of bad order cars during the last several years.*

Similarly, the creditors also discovered that the Trustee's increasingly poor cash and net working capital position has severely further constrained the Trustee's minimal track maintenance projects, as noted above. In 1978, much of the limited rehabilitation work the Rock Island undertook was funded by the RTA, the State of Iowa and Iowa shippers. For example, of the 43.21 miles of new rail laid, 16.74 miles of it, or more than 38%, was RTA funded. Much of the remaining rail laid represented repair of northwest Iowa branch lines funded by interest-free loans from shippers and the State of Iowa.

We also note with extreme concern the Trustee's claim that he may be unable to fund for lack of cash the single

most important planning project of his Trusteeship, *i.e.*, the retention of an independent consultant to conduct a thorough study of the Rock Island's reorganization propsects and viability. Statements by Trustee's counsel in this regard are astounding because all that is involved is the rendition of 4,600 man hours of service by existing personnel and possibly the hiring of one or two additional employees. The total cost to the Rock Island should approximate only $100,000.00 (4600 man hours of Rock Island personnel × $20.00/hour).

Table XXIV below shows the Trustee's deteriorating cash position:

TABLE XXIV

ROCK ISLAND CASH AND SHORT TERM INVESTMENTS

(in millions of dollars)

Date	Amount
December 31, 1974	$ 3.6
March 17, 1975	6.8
December 31, 1975	20.8
December 31, 1976	19.6
December 31, 1977	16.4
December 31, 1978	16.6
January 31, 1979	12.0
February 28, 1979	4.6
March 31, 1979	4.6
April 30, 1979	3.2
May 31, 1979	3.9
June 30, 1979	3.0

Source: ICC CBS Reports and RI General Balance Sheets.

Table XXIV is deeply disturbing because the depletion of the Trustee's cash reserves has occurred in what is traditionally the Rock Island's most prosperous season of the year. As a result, the Trustee will enter the winter months of 1979 with no reserve of cash and the most unfavorable working capital deficit in its entire history.

If the Rock Island is afflicted by either (i) another severe winter, (ii) an economic recession of any significance at all or (iii) a crippling strike,[3] it will clearly not survive another year absent massive federal financial assistance supplied, if at all, at the expense of the creditors and the erosion of their security.

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[3] Unfortunately, a strike is now in progress.

United States Court of Appeals
For The Seventh Circuit
Liquidation Order

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

ARGUED: DECEMBER 8, 1980

February 11, 1981.

Before

Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. WESLEY E. BROWN, Senior District Judge*

In the Matter of:

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,
Debtor.

No. 80-1353

Appeal of:

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Intervenor.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 75 B 2697

Frank J. McGarr, *Judge.*

ORDER

This case presents one aspect of the continuing saga of the decline of the Chicago, Rock Island and Pacific Railroad Company ("Rock Island"). There are two questions before us in this appeal:

(1) Did the district court, sitting as a railroad reorganization court under Section 77 of the Bankruptcy Act, 11 U.S.C. § 205, have the discretion to determine that the

* Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, is sitting by designation.

Trustee's plan of reorganization was unworkable and to refuse to transmit that plan to the Interstate Commerce Commission ("ICC")?

(2) Did the district court, sitting as a railroad reorganization court, have the authority to order the Trustee to commence liquidation of the railroad?

The Railway Labor Executives' Association ("RLEA") argues that we should reverse the district court's order directing the Trustee to liquidate the Rock Island estate and that we should order the district court to transmit to the ICC the plan of reorganization filed by the Trustee on December 28, 1979. The Trustee of the Rock Island, William M. Gibbons, and various creditors of the Rock Island ("Creditors")[1] ask us to dismiss this appeal as moot or to affirm the actions of the district court.

I

On March 17, 1975, the Rock Island filed a petition for reorganization in the United States District Court for the Northern District of Illinois under Section 77 of the Bankruptcy Act, 11 U.S.C. § 205.[2] Judge McGarr was assigned

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[1] The parties referred to collectively as "Creditors" are as follows: First National Bank of Chicago and Continental Illinois National Bank and Trust Company of Chicago, in their capacities as indenture trustees, and Henry Crown, et al., holders of first mortgage bonds, income debentures and common stock of the Rock Island.

The Trustee joined in the Creditors' Brief solely on the ground that the liquidation is not reversible and is so far advanced that any delay would be physically and economically impossible.

[2] The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978), enacted November 6, 1978, codified and changed the prior Bankruptcy Act, including former Section 77. Section 403(a) of the Bankruptcy Reform Act, 92 Stat. 2683, however, provides that pending reorganizations, such as the one at bar, were to be governed by the previous law except for a few exceptions set forth in Section 403(b).

to act as the reorganization court. On March 28, 1975, William M. Gibbons was appointed Trustee of the Rock Island and was instructed to manage and operate the debtor's railroad system.

Section 77(d) provides that "[t]he debtor, after a petition is filed . . . , shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed . . . ." 11 U.S.C. § 205(d). The reorganization court several times extended the deadline for the Trustee to file a plan of reorganization. The Trustee filed his Plan of Reorganization ("Plan") on December 28, 1979.[3] An informational copy was furnished to the ICC in accordance with Bankruptcy Rule 8-301(c).

On January 8, 1980, the court entered Order No. 221. In that order the court found: it had jurisdiction pursuant to Bankruptcy Rule 8-303[4] to retain the Plan for not less

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[3] Throughout the five years of reorganization prior to the filing of the Plan, the Rock Island suffered significant financial losses. The ICC found the Rock Island to be cashless on September 26, 1979, and ordered the Kansas City Terminal Railway Company ("KCT") to provide directed service over the Rock Island routes. *Directed Service Order No. 1398, Kansas City Terminal Ry.—Directed to Operate Over—Chicago, R. I. & P.*, 360 I.C.C. 289 (1979). This directed service was in effect at the time of the order appealed in the case at bar.

KCT's directed service ended on March 23, 1980. Following KCT's directed service operations, other rail carriers provided rail service over the Rock Island's lines through May 31, 1980, pursuant to ICC directed service orders. On May 30, 1980, the President signed the Rock Island Railroad Transition and Employee Assistance Act (the "Rock Island Act"), P.L. 96-254, 94 Stat. 339 (1980). The Rock Island Act provides for the continuation of directed service pending sales of the Rock Island's freight lines to other interested rail carriers and its Chicago-Joliet commuter line to the Regional Transportation Authority.

[4] Bankruptcy Rule 8-303 provides:

> Not less than 30 days after the first filing of a plan under Rule 8-301, the court shall transmit all plans and modifications which have been filed with it to the Interstate Commerce Commission for filing with and consideration by the Commission.

than thirty days; during that time the court would review the plan in the context of a study by Peat, Marwick & Mitchell, a court appointed independent consultant, and would consider modifications, alternative plans, and comments; the informational copy of the plan filed with the ICC did not constitute an official filing with the ICC; and the court would "formally transmit the Plan of Reorganization, modifications to it, and alternative plans, in accordance with Bankruptcy Rule 8-303, with whatever comments it may have, to the Commission for their action, pursuant to Bankruptcy Rule 8-303, with instruction to the Commission that the Commission should consider the Plan at that time."

On January 21, 1980, Peat, Marwick, Mitchell & Co. filed its report, in which it concluded that the core operation proposed by the Trustee in the Plan was not viable. At a status hearing on January 25, 1980, the Creditors and the Federal Railroad Administration argued that since the independent consultant had concluded that the Trustee's Plan was not feasible, the court should direct the Trustee to withdraw the Plan and to file a new plan which would provide for the total liquidation of the estate. The Creditors argued that the court would simply be wasting everyone's time in transmitting the Plan, or any reorganization plan, to the ICC. At that time, the Trustee argued that the Plan should be forwarded to the ICC for evaluation of the reorganizability of the core.

After listening to the arguments of counsel who were present at that status conference,[5] the court concluded that

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[5] The ICC did not appear at the hearing of January 25, 1980, although the ICC had been active in the proceedings to that date. At the January 25 hearing, John Broadley of the United States Department of Justice, representing the Federal Railroad Administration, stated:

> In connection with preparing a proposed order I had a discussion with Mr. Rush yesterday about the position the Com-

the consultant's report "is a good study and I am compelled to accept its conclusions." Tr. 97. The court continued:

> This being so I am compelled also, if logic prevails, to accept the conclusion that the plan of reorganization proposed by the Trustee has no hope of success.
>
> The Trustee is therefore instructed not to forward the plan of reorganization to the Commission. The Trustee is instructed to continue his present plans for cessation of operations by the time of the anticipated termination of the directed service order with the hope that that might be extended, and the Trustee is instructed to prepare and file with the Court a preliminary plan of liquidation . . . .

Tr. at 97. The court's minute order of January 25, 1980 granted the Creditors' motion that the court decline to forward the Plan to the ICC and directed the Trustee to begin preparation of a plan of liquidation.

On February 19, 1980, the RLEA filed comments on the court's January 25 order. The court ordered that it would treat the comments as a motion for reconsideration. On February 27, 1980, the court denied the RLEA's motion to reconsider. The RLEA appeals from both the order of January 25, 1980 and the denial of reconsideration.

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mission would likely take if your Honor entered an order directing the Trustee to withdraw this plan. Mr. Rush indicated that if your Honor entered such an order the Commission, in all likelihood, would not find it expedient, necessary or proper to appeal that decision on jurisdictional grounds. And the Commission has frequently expressed concern about the exercise of its primary jurisdiction. Mr. Rush's indication to me was that if your Honor finds that the plan has no merit and decides that you should order the Trustee to withdraw it, that the Commission would acquiesce in that decision.

Tr. at 56-57. Mr. Broadley joined the creditors in seeking to have the plan of reorganization withdrawn.

Before proceeding to the legal arguments, we briefly recount the history of the Rock Island since February, 1980. On March 19, 1980, the court entered Order No. 229, which required the Trustee to file a plan of reorganization by July 17, 1980, encompassing the liquidation of the assets of the debtor. On April 14, 1980, the court entered Order No. 232, which directed the Trustee to file an application with the ICC "for its report confirming the abandonment of the Rock Island's total railroad system subject to sale of portions of such system to other entities for their operation thereof."[6]

The ICC filed its report in response to the Trustee's application for system-wide abandonment on May 23, 1980. Docket No. AB-46 (Sub.-No. 22). The ICC concluded that "abandonment of the Rock Island and its dissolution as an operating railroad is required by the public convenience and necessity." Docket No. AB-46 (Sub.-No. 22) at 3. The ICC denied the RLEA's motion to reject the abandonment application. *Id.* at 5-6.

On June 2, 1980, the reorganization court held hearings concerning the proposed abandonment and ordered total system-wide abandonment of the Rock Island's lines and discontinuance of its service.

The Trustee already has taken various steps toward liquidating the Rock Island. On June 16, 1980, the RLEA moved for a stay of liquidation, detailing the progress of the liquidation as follows:

> Rolling stock leases have been assigned or terminated while other operating equipment has been sold. On

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[6] Section 17(a) of the Milwaukee Road Restructuring Act ("MRRA"), Pub. L. No. 96-101, 93 Stat. 736 (1979), transferred ultimate jurisdiction over abandonments from the ICC to the reorganization court for cases pending under Section 77 of the Bankruptcy Act. Section 17(a) of the MRRA provides that the court may authorize abandonments pursuant to 11 U.S.C. § 1170.

> May 5, 1980, the District Court entered Order No. 234 granting the Trustee blanket authority to liquidate real and personal assets and accounts under $100,000.00 in value. Real property, such as track rights of ways, has been sold. *See,* Docket Sheet Page 194-95. Also, an independent consultant has been retained by the estate to expeditiously liquidate the real property of the estate. Order dated May 28, 1980.

RLEA Motion to Stay at 5. On November 21, 1980, this court ordered that the RLEA's motion to stay further acts of liquidation pending appeal would be taken with the case at the time of its disposition.

On December 20, 1980 the RLEA filed with this court its "Emergency Renewal of Motion by Railway Labor Executives' Association to Stay All Further Acts of Liquidation Pending Appeal." The "Renewed Motion" was prompted by the Trustee's announcement of his intention to sell the Silvis, Illinois, facility and 214 locomotives to the Varlen Corporation. The RLEA argued that:

> [t]his single sale will surely decrease the already slim chances for reorganizing the Rock Island, for any resumption of rail operations over the core structure would encounter severe difficulties in resuming operations without sufficient engines and a major repair facility.

RLEA Renewed Motion at 4.

On December 24, 1980 we entered the following order:

> IT IS ORDERED that the renewed motion is DENIED to the extent that it seeks a stay of the sale of the properties mentioned in the intervenor-appellant's renewed motion. Intervenor-appellant has failed to satisfy all of the requirements for a grant of stay pending appeal. We cannot conclude at this point in our deliberations that the intervenor-appellant shall

prevail on the merits of this appeal.

> The intervenor-appellant's motion of June 16, 1980, seeking a general stay pending appeal in this case, shall be resolved at a later date by the merits panel.

We now reach the merits and conclude that the district court acted within its authority in refusing to transmit the Trustee's plan of reorganization to the ICC and in ordering the Trustee to commence liquidation of the Rock Island.

II

Section 77(d) of the Bankruptcy Act, 11 U.S.C. § 205(d), deals with the filing of a plan of reorganization in a railroad reorganization. The RLEA argues that the ICC is to play the major role in reorganizing a debtor under Section 77, and that Bankruptcy Rule 8-303 cannot enlarge the jurisdiction of the court to examine the merits of a plan prior to transmittal to the ICC pursuant to Rule 8-303.

First, the RLEA argues that the ICC has the primary responsibility for formulating a reorganization plan and that, therefore, the reorganization court should not have rejected the Plan before the ICC had a chance to consider it. The RLEA finds support for its argument in *Ecker v. Western Pac. RR. Corp.*, 318 U.S. 448 (1943), where the Supreme Court stated:

> When examined to learn the purpose of its enactment, § 77 manifests the intention of Congress to place reorganization under the leadership of the Commission, subject to a degree of participation by the court.

318 U.S. at 468. But, while recognizing the importance of the expertise of the ICC, the Supreme Court also recognized the power of the reorganization court to find that a debtor is unreorganizable. The Supreme Court acknowledged that the reorganization court can veto a reorganiza-

tion plan in its entirety after certification of the plan by the ICC. 318 U.S. at 474. *See* Section 77(e), 11 U.S.C. § 205(e).

The RLEA's reliance on *Ecker* to establish that the reorganization court should defer to ICC findings is misplaced. In *Ecker*, the Court affirmed the district court's approval, pursuant to Section 77(e), of a plan of reorganization certified by the ICC. The Court reversed the Ninth Circuit's finding that the district court should have exercised its independent judgment with respect to subjects such as valuation. A reorganization court's acceptance of ICC findings in proceedings pursuant to Section 77(e) simply is not relevant to the question of whether the reorganization court can order the Trustee to withdraw a proposed plan *before* submission to the ICC. *Ecker* dealt with the reorganization court's scope of review of a plan *after* certification by the ICC, not with a proposed plan submitted to the court by the Trustee.

Furthermore, in the more recent *New Haven Inclusion Cases*, 399 U.S. 392, 431-34 (1970), the Supreme Court emphasized the important, indeed dominant, role of the reorganization court in Section 77 proceedings. In that case, as in *Ecker*, the issue was the reorganization court's scope of review of ICC findings pursuant to Section 77(e). The Court stated:

> The statutory authority to appoint special masters and hold evidentiary hearings reflects the unique powers possessed by the reorganization court in passing upon the Commission's proposed plan of reorganization.
>
> . . .
>
> In the reorganization court reposes ultimate responsibility for determining that the plan presented to it by the Commission satisfies the "fair and equitable" requirement of § 77.

399 U.S. at 434. Without deciding to what degree *New Haven Inclusion Cases* erodes *Ecker's* deference to ICC expertise in Section 77(e) proceedings,[7] we find that the balance of power between the reorganization court and the ICC in Section 77(d) proceedings does not require the reorganization court to seek ICC consideration of a proposed reorganization plan when the court has found that the plan has no chance of success.

Next, the RLEA argues that the structure of Section 77(d) and Rule 8-303 show that the court's role with respect to the Trustee's plan is purely ministerial. The RLEA claims that the purpose of allowing the court to retain a plan for *not less than* 30 days is only for the sake of achieving efficiency by assuring that "all proponents of plans have filed their plans prior to transmission of the first filed plan to the Commission." Rule 8-303, Advisory Committee Note. We disagree. The ordinary outcome under Rule 8-303 will be that the court will transmit a plan to the ICC. But we cannot say that the court has no discretion whatsoever to aid in the efficient management contemplated by Rule 8-303 by refusing to transmit a manifestly unfeasible plan to the ICC.

Shortly after the Trustee's Plan was submitted, but before it was evaluated in light of the Peat, Marwick study, the reorganization court reflected on the purposes of Rule 8-303:

> Those purposes are obviously a preliminary review by the Court, of the proposal of alternative plans, and in the particular instances of this case an opportunity for the Court and the creditors and the Railroad, and the Government, to view this plan in the context of the Peat, Marwick evaluation of it. And under any ordinary circumstance that would not only be the ordinary

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[7] In his dissent, Justice Black complained of the majority's departure from *Ecker*. 399 U.S. at 499.

> course of the case but the wise course of the case. I think the thirty days is therefore a purpose. I recognize that the Court had very little discretion in this matter in terms of what it might do with the plan. It is conceivable to me, although I doubt that it will be applicable in this case, that the plan presented be one either by reading on its face or in the light of the Peat, Marwick evaluation, be one so completely without merit that the Court will not forward it to the Commission and order the preparation of another one, something more sensible.

Tr. of January 2, 1980 at 31-32. The court recognized that its discretion not to submit the plan to the ICC was limited to a situation that the court doubted would occur—that the plan was without merit in light of the Peat, Marwick study. But that situation did occur, and the court properly exercised its discretion not to transmit the plan.

The court's action did not circumvent ICC involvement in either the reorganization or liquidation process. The court did not simply withhold the Plan from the ICC and commence reorganization without ICC input. Rather, the court ordered the Trustee to prepare a new plan aimed at liquidation. In fact, the court stated that the January 25, 1980 decision not to transmit the plan to the ICC "starts now rather than later the process of private sale and Commerce Commission reorganization of railroad service . . . ." Tr. of January 25, 1980 at 98.

The ICC has not challenged the reorganization court's actions. At the hearing before the January 25 ruling, the government representative present informed the court that "[ICC counsel's] indication to me was that if your Honor finds that the plan has no merit and decides that you should order the Trustee to withdraw it, that the Commission would acquiesce in that decision." Tr. of January 25, 1980 at 56-57. In addition, the ICC's May 23, 1980 report recom-

mending abandonment supports the court's view. The ICC states that

> [w]e have reviewed the carrier's present financial position and future prospects and conclude that it has no realistic hope for reorganization or continued service in its present form. The extremely deteriorated condition of its plant and severe erosion of its traffic base (through interrupted and uncertain operations) make it clear that the Rock Island will not be able to recover. Consequently, fairness to its creditors and stockholders dictates that the carrier be liquidated.

Docket No. AB-46 (Sub.-No. 22) at 3-4.

In light of the ICC's deference to the reorganization court's view of the Trustee's plan, as well as that court's great familiarity with the Rock Island through five years of reorganization proceedings, it is inaccurate for the RLEA to argue that the court simply "substituted its judgment for that of the Commission." Reply Br. at 7. The court's decision must be viewed in the context of the entire history of the Rock Island. Judge McGarr stated in his January 25, 1980, ruling:

> I have listened to the Trustee for years through his counsel argue that I authorize and continue to be patient with the attempts to bring about a cash-based reorganization, based upon my finding of reorganizability. Mr. Manos argues in an abundance of emotion today that I should not decide that issue in four hours. I have in fact thought of very little else for four years. It has been the basic issue that I have confronted and the issue which I have had to decide over and over again as circumstances changed.

Tr. of January 25, 1980 at 95. Therefore, we hold that Judge McGarr's decision not to transmit the Trustee's plan

to the ICC violated neither Section 77(d) of the Bankruptcy Act nor Bankruptcy Rule 8-303.

III

The RLEA argues that, in addition to not having jurisdiction to decide that the Trustee's plan was without merit, the reorganization court did not have the jurisdiction to order the Trustee to liquidate the Rock Island. The RLEA claims that Section 1174 of the Bankruptcy Reform Act of 1978, 11 U.S.C. § 1174, for the first time permitted railroad reorganization courts to direct and control liquidations, and that Section 77 of the Bankruptcy Act, which applies to this case,[8] contains no authority for liquidation. Thus, the RLEA argues that the court may dismiss the petition for undue delay in reorganization, pursuant to Section 77 (g) and Bankruptcy Rule 8-310, but it may not unilaterally determine that the debtor is unreorganizable and order liquidation.

According to the RLEA's interpretation of Section 77, the reorganization court must either dismiss the petition for reorganization or continue reorganization. The RLEA does not acknowledge the possibility that liquidation may be the end result of a Section 77 reorganization. But the RLEA's view ignores the fact that it is difficult to mark the point at which an attempt to reorganize becomes a liquidation. It would be absurd to hold that the reorganization could may supervise liquidation of all but a small core railroad, yet cannot supervise the liquidation of much of the same property once the concept of a viable core has been rejected.

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[8] According to § 403 of the Bankruptcy Reform Act, some provisions of the new Bankruptcy Code are applicable to Section 77 cases pending before its enactment. But, Section 1174 is not one of those sections which applies to cases commenced under the Bankruptcy Act. Pub. L. No. 95-598, 92 Stat. 2683 (1978).

Section 77 does not set any limit on what portion, if any, of the debtor must be preserved pursuant to Section 77 proceedings. Section 77(b), 11 U.S.C. § 205(b) states:

> (b) A plan of reorganization within the meaning of this section . . . (5) shall provide adequate means for the execution of the plan, which may include . . . the *sale of all* or any part of the property of the debtor . . . .

(emphasis added). In *New Haven Inclusion Cases*, the Supreme Court discussed the reorganization court's power to sell the assets of the New York, New Haven & Hartford Railroad ("New Haven") pursuant to § 77(b) (5). After noting that the reorganization court and trustees were "charged with the dual responsibility of conserving the debtor's estate for the benefit of creditors and preserving an ongoing railroad in the public interest," 399 U.S. at 420, the Court stated:

> The provisions of § 77 "doubtless suffice[d] to confer upon the [reorganization court] power appropriate for adjusting property rights in the railroad debtor's estate and, as to such rights, beyond that in ordinary bankruptcy proceedings." *Id.*, at 85-86; cf. 5 Collier, *supra*, ¶ 77.11, at 498-499. Together, the court and the Commission "unquestionably" had "full and complete power not only over the debtor and its property, but also, as a corollary, over any rights that [might] be asserted against it." *Callaway v. Benton*, 336 U.S. 132, 147. One such power was precisely that which the Commission was about to propose that the reorganization court exercise—the power to confirm a plan of reorganization providing for "the sale of all . . . of the property of the debtor . . . ." Bankruptcy Act, § 77(b)(5), 11 U.S.C. § 205(b)(5).

399 U.S. at 421 (footnote omitted). *See also Matter of Lehigh Valley R.R. Co.*, 558 F.2d 137, 141-47 (3rd Cir. 1977)

and cases cited therein.[9] These cases indicate that each railroad in reorganization under Section 77 must be handled according to the unique circumstances of that debtor, and liquidation may be an appropriate option.

The RLEA does not seriously urge dismissal of this action and resort to equity receiverships for liquidation,[10] but it does ague that an equity receivership is the only way that the creditors of the Rock Island may withdraw their assets from public use at this time. The RLEA claims that

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[9] In *Lehigh Valley*, the Third Circuit stated that "these cases provide persuasive support for the proposition that the reorganization of a railroad may properly continue under Section 77 despite the fact that the enterprise is no longer capable of being reorganized into a working railroad." 558 F.2d at 146. The court concluded that the reorganization court had jurisdiction "to reorganize or liquidate the enterprise pursuant to § 77, or pursuant to any other provisions of the Bankruptcy Act, if the court finds that such action would be in the best interests of the debtor's estate." 558 F.2d at 146-47.

The RLEA argues that the Lehigh Valley reorganization court's authority to liquidate under Section 77 comes from § 618(b) of the Railroad Revitalization and Regulatory Reform Act of 1976, which added § 601(b)(4), 45 U.S.C. § 791, to the Regional Rail Reorganization Act of 1973 ("Rail Act"), Pub. L. 93-236, 45 U.S.C. §§ 743, 744. But *Lehigh* and the cases discussed therein actually stand for the opposite result: the amendment authorized the continuation of Section 77 proceedings *despite* the special provisions in the Rail Act which transferred working railroad property to Conrail. 558 F.2d at 141-42.

[10] One of the reasons for enactment of Section 77 was to avoid equity receiverships for railroads. As stated in *New Haven Inclusion Cases*:

> Congress enacted [Section 77] in part "to prevent the notorious evils and abuses of consent receiverships," *New England Coal & Coke Co.* v. *Rutland R. Co.*, 143 F.2d at 184, of which one of the more egregious was the requirement of an ancillary filing and order of appointment in the federal court for every district in which the debtor had property.

399 U.S. at 426-27.

since the creditors have enjoyed the benefits of having a single resolution of all claims, rather than many receiverships, they should bear the burden of serving the public interest by keeping their property invested in rail service. But the history of this case indicates that the reorganization court has duly considered the public interest throughout the reorganization proceedings and has determined that continued operation of the Rock Island no longer serves the public interest. Thus, the liquidation order does not violate the public interest considerations required by Section 77.

In summary, the reorganization court had the jurisdiction under Section 77 to decline to accept the Trustee's Plan and to order the Trustee to formulate a plan of liquidation. Furthermore, the reorganization court properly exercised its discretion in exercising that jurisdiction. Because of our holding on the merits, it is unnecessary to reach the Creditors' argument that this case is moot.

The order appealed from is

AFFIRMED.

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No. 80-415

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

RAILWAY LABOR EXECUTIVES' ASSOCIATION,

Appellant,

v.

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; HENRY CROWN, et al.; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL P. GOLDSCHMIDT, Secretary of Transportation,

Appellees.

On Appeal From The United States District Court For The Northern District Of Illinois, Sitting As A Railroad Reorganization Court

---

SUPPLEMENTAL APPENDIX TO APPELLEES' MOTION TO AFFIRM

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December 17, 1980

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APPENDIX A

TRANSCRIPT OF PROCEEDINGS BEFORE JUDGE McGARR

September 21, 1979
(Pages 7–11)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF:	)	
	)	
CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,	)	No. 75 B 2697
	)	
Debtor.	)	

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled matter before the HONORABLE FRANK J. MC GARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois on Friday, the 21st day of September, 1979, at the hour of 4:00 o'clock p.m.

PRESENT:

MR. WILLIAM M. GIBBONS

Trustee;

MR. NICHOLAS G. MANOS
MR. O. L. HOUTS
(332 South Michigan Avenue
Chicago, Illinois 60604)

appeared on behalf of the Trustee;

JENNER & BLOCK
(One IBM Plaza, 42nd Floor
Chicago, Illinois 60611) by
MR. ALBERT E. JENNER, JR.
MR. DANIEL R. MURRAY
MR. CARTER H. KLEIN and
MS. LINDA MULLENBACK

appeared on behalf of certain intervenors;

MR. MANOS: I won't give my view, I will just state the facts.

THE COURT: Let Mr. Manos state his current status in the matter.

MR. MANOS: Your Honor, the fact of the matter is that President Carter yesterday exercised his presidential powers and created, or announced the creation of an emergency board. Now I won't go into details relative to the Executive Order. It is a short one. It is dated September 20th, 1979 from the White House. Most of the details relative to the Executive Order are contained in the media, but nevertheless, for the record, let me state -- let me read it into the record, if I may, your Honor, it is a very short one.

THE COURT: All right.

MR. MANOS: This is an Executive Order, this is dated from the White House, September 20th, 1979 creating an emergency board to investigate disputes between the Chicago, Rock Island, Pacific Railroad and Peoria Terminal Company and the Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express and Station Employees and the United Transportation Union.

"Disputes exist between the Chicago, Rock Island & Pacific Railroad and Peoria Terminal Company and certain of its employees represented by both the Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers,

Express and Station Employees and the United Transportatio
Union. These disputes have not heretofore been adjusted under the provisions of the Railway Labor Act as amended, and these disputes in the judgment of the National Mediation Board threatens substantially to interrupt interstate commerce to a degree such as to deprive a section of the country of essential transportation service Now, therefore, by authority vested in me by Section 10 of the Railway Labor Act as amended, 45 United States Code 160, it is hereby ordered as follows: Section 1-101. Establishment of Board: There is established a Board of three members to be appointed by the President to investigate these disputes. No member of the Board shall be peculiarly or otherwise interested in any organization of railroad employees or any carrier. Section 1-102, report: The Board shall report its findings to the President with respect to these disputes within thirty days from the date of this order. Section 1-103. Maintaining conditions: As provided by Section 10 of the Railway Labor Act as amended, from this date and for thirty days after the Board has made its report to the President. No change, except by agreement, shall be made by the Chicago, Rock Island, Pacific Railroad and Peoria Terminal Company, or by its employees, in the conditions out of which these

disputes arose."

Your Honor, while we have not been formally served by anybody with the Executive Order we have a copy of it and we acknowledge that the Order was entered by the President. We need no formal announcement of the fact.

Your Honor, this morning Mr. Gibbons sent telegrams to Mr. Fred Kroll, and also to Mr. Chester, the gentlemen representing the Brotherhood of Railway, Airline & Steamship Clerks and the United Transportation Union, respectively. The telegram in content is the same as to each gentleman, and I would like to read that into the record.

"Concerning President Carter's appointment of an emergency board to review our dispute to accomplish orderly return of employees to work, in accord with our returning business, we require your prompt cooperation. Please advise when UTU" --

and the other telegram, your Honor, obviously it said "BRAC."

"-- Please advise when UTU will comply with President Carter's Executive Order."

Now, your Honor, this was signed by the Executive Vice-President of the Railroad. We have not received a response to the telegram from the Brotherhood of Clerks. We have received, as of September 21st at 2:16 p.m. a telegram from Mr. L.H. Chester, the President of the United Transportati Union addressed to the Executive Vice-President, Mr. Mitros

of the Rock Island Railroad.

"IN RE: Your telegram September 21, 1979. Alleged appointment of emergency board, Rock Island Railroad. Upon receipt of official notification of President Carter's Executive Order and appointment of an emergency board we will advise you the UTU return to work arrangements."

This is signed L.H. Chester, President.

Your Honor, to this moment we have not received, but hopefully and expectantly are awaiting a response from BRAC. We are quite anxious, your Honor, and the Trustee is quite anxious to meet with the two Unions and to arrange a back to work, in line with the Executive Order of President Carter.

THE COURT: It is not unreasonable to assume, since you didn't receive an official service of the order, and UTU said they haven't received it, that maybe nobody as yet received it.

MR. MANOS: Your Honor, I do believe it has been entered. I saw President Carter announcing the Board --

THE COURT: I am sure it's been entered, the President has announced it, the Fedral Railway Administrator called me and said that it had been entered. I suppose if the Unions are taking a position that until it is served upon them they are not going to recognize it we have to deal

with that position. Go ahead.

MR. MANOS: Now, your Honor, with respect to today's status report hearing. Your Honor knows that late in the month of August, I believe August 27th or 28th, the strike occurred. The strike was brought first by BRAC and then by UTU. I won't go into the details that led to the strike by the two Unions, and which included then a walk-out by all of the other unions.

Since that date the Rock Island, in the exercise of its common carrier obligation, has been operating to the best of its ability, which leads us to today's status report with respect to cash and the cash requirement attendant -- the on-going strike operation of the Trustee.

Now, your Honor, I have noted as I walked into this courtroom the presence of many parties in interest. They are parties in interest. I have noticed the representativ and the attorneys of BRAC present in the courtroom. They have a right to be here, and certainly they have an urgent interest in the proceedings.

I have noticed that there are representatives of UTU. They equally have a right to be here.

I have noted the presence of a gentleman, and other parties, that represent various public interests, State and Federal. And, of course, the ever present creditors of the Chicago, Rock Island Railroad, the two banks and,

APPENDIX B

TRANSCRIPT OF PROCEEDINGS BEFORE JUDGE McGARR

January 25, 1980

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF:	)	
	)	
CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,	)	No. 75 B 2697
	)	
Debtor.	)	

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled matter before the HONORABLE FRANK J. MC GARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois on Friday the 25th day of January, 1980, at the hour of 2:00 o'clock.

PRESENT:

MR. WILLIAM J. GIBBONS,

appeared as Trustee;

MR. NICHOLAS J. MANOS
MR. O. L. HOUTS
(332 South Michigan Avenue
Chicago, Illinois 60604)

appeared on behalf of the Trustee;

JENNER & BLOCK
(One IBM Plaza, 42nd Floor
Chicago, Illinois 60611) by
MR. ALBERT JENNER, JR.
MR. DANIEL R. MURRAY
MR. CARTER KLEIN
MS. LINDA MULLENBACH

appeared on behalf of certain intervenors;

MR. JENNER: And I report to you that because of Mr. Bannister's presentation. Your Honor said to that Committee, there is a public interest involved in these proceedings, in all these reorganizations. There are also the creditors that must be protected to the extent it is possible to protect them and not yielding to states or others at the expense of the creditors.

During the course of these proceedings your Honor has repeated that. And I say that to your Honor solely because Mr. Bannister has said today what he said during the first day of these proceedings before your honor, that he cares for the State of Iowa, and I don't blame him for that, and its shippers, but at the expense of everybody else and all other public interests and the creditors of this corporation.

THE COURT: I think I have heard enough of what has probably been the best oral arguments I have had the pleasure of listening to from the various attorneys involved in this case. I think I have heard enough, in addition to having studied enough of the proposed plan of reorganization and the viable core and the Peat-Marwick study to reach a conclusion which I intend to announce concerning the matters that have been debated here today.

Preliminarily, though I find it disappointing in this focus on whether I should substitute my judgment

for the Interstate Commerce Commission, and decline to forward a plan to them that the Commerce Commission is not represented here. I regret that fact and candidly don't quite understand it. They have been here on other occasions when their presence was much less helpful than it would be now.

Let me indulge in a little bit of reminiscence and history about the Rock Island since the fateful St. Patrick's Day when it first came to my attention.

I appointed as Trustee and attorney for the Trustee two gentlemen in whom I had a great deal of confidence and my confidence in them has never diminished, and I have over the years indulged their sincere hope and expectation of an income based reorganization of the Rock Island. I have admired the Trustee's resourceful effort to achieve this, and I think with the creditors I shared his frustration, when an extremely difficult winter, and rising fuel cost, and disappointing traffic statistics intervened to really doom those efforts and to bring us to a state of cashlessness which we faced some several weeks ago. I have always indulged the hope of what I think is probably the gist of what I expressed before the Senate Committee that Congress would see its obligation if the public interest were really to be served here, to address its attention to the Rock Island as it did to the

Eastern Railroads which were the result of Con-Rail to the passenger service, with the result of Amtrak, and to the recent action to the Milwaukee, with sufficient help to bring about what I think was what Mr. Gibbons once described as Farm-Rail, which I thought was an excellent term to describe what I hoped we could achieve here. I watched the attempts of the Trustee and his counsel to sell off segments of the Rock Island, and have been disappointed, with one happy exception, there have been no tangible results from that acitivity, despite strenuous efforts.

I pushed Mr. Manos, in terms of timetable, in the filing of a plan of reorganization to the point where when I saw him on the street and noted his declining weight I had a severe attack of conscience because I was afraid I was driving him into bad health. I have listened to the Trustee for years through his counsel argue that I authorize and continue to be patient with the attempts to bring about a cash-based reorganization, based upon my finding of reorganizability. Mr. Manos argues in an abundanc of emotion today that I should not decide that issue in four hours. I have in fact thought of very little else for four years. It has been the basic issue that I have confronted and the issue which I have had to decide over and over again as circumstances changed.

The concept of liquidation of a railroad

means tremendous hardship, economic dislocation, the public interest has always been on the side of my hope of continued operation, if not in whole or at least in part of the Railroad. I have until now balanced the equities of the rights of the creditors against the public interest in favor of continuing operations. I have watched the Trustee do what I regard as a masterful job but it has not succeeded because success was not possible as somebody argued today, except under a set of perfect economic and social circumstances, and life being what it is that perfect set of circumstances never came to pass.

I have had an opportunity to go over the plan of reorganization. It is not a liquidation plan. It is a plan for reorganization of a proposed viable core. Liquidation is there only as an alternative possibility, as the creditors have argued, and the details of a plan of liquidation might be quite different than the details of a plan of reorganization, particularly in the area of priority and creditors' rights. So we have a basic reorganization plan which acknowledges the possibility of liquidation but is not a liquidation plan.

We went through a lot of travail, all of us, spent a lot of hours, missed a lot of dinner dates in constructing the framework for the final appointment of a Court's witness to determine the possibility of

reorganizability. And we wound it up in the unusual position of having, because of the intervention of cashlessness, having to force the filing of a plan of reorganization at about the same time as we were completing a study as to the potential of reorganizability so that the plan and the Court's witness study reached me at approximately the same time.

I have studied the plan of reorganization, as I said, and I have studied the Peat-Marwick report, my own witness. I am satisfied that the witness that the parties recommended to me and whom I chose has done a fine job. It is a good study and I am compelled to accept its conclusions. This being so I am compelled also, if logic prevails, to accept the conclusion that the plan of reorganization proposed by the Trustee has no hope of success.

The Trustee is therefore instructed not to forward the plan of reorganization to the Commission. The Trustee is instructed to continue his present plans for cessation of operations by the time of the anticipated termination of the directed service order with the hope that that might be extended, and the Trustee is instructed to prepare and file with the Court a preliminary plan of liquidation by a date which I will let him pick since only he can tell me how much time he thinks is necessary for

him to do that.

Before I finalize that order I would like to say that this ruling, in my judgment, means only that the final and inevitable decision that I have just made will have little effect on the public interest. It does now what would inevitably be done in a matter of a few months and it starts now rather than later the process of private sale and Commerce Commission reorganization of railroad service in order to patch together the best possible compromise between the public interests and the creditors' interests. And I guess it finalizes what will be the last chapter in the long and regrettably sad history of the Rock Island.

That will be the order based on the motion made today, and I would ask Mr. Manos, if you care to comment now or wish to reflect on it how much time you think it would take to prepare a liquidation plan which will be a modification I would guess of your reorganization.

MR. MANOS: Your Honor has not commented on the rebuttal to the PMM study that I placed --

THE COURT: I have not accepted your filing of the rebuttal of the PMM study. I decline to do so for the reason that I have read the PMM study. I have listened to comments on it today. I have indicated that in the main I accept it. I would expect that there might be

APPENDIX C

REPORT OF EMERGENCY BOARD NO. 191

October 22, 1979

REPORT

TO

THE PRESIDENT

BY

EMERGENCY BOARD

NO. 191

APPOINTED BY EXECUTIVE ORDER 12159, DATED SEPTEMBER 20, 1979, PURSUANT TO SECTION 10 OF THE RAILWAY LABOR ACT, AS AMENDED.

To investigate disputes between Chicago, Rock Island and Pacific Railroad Company and certain of their employees represented by the United Transportation Union and the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes.

(National Mediation Board Case Nos. A-10287, A-10303, A-10324, A-10313 and A-10314)

WASHINGTON, D. C.

October 22, 1979

Washington, D. C.

October 22, 1979

The President
The White House
Washington, D. C.

Dear Mr. President:

On September 20, 1979, pursuant to Section 10 of the Railway Labor Act, as amended, and by Executive Order 12159, you created an Emergency Board to investigate disputes between the Chicago, Rock Island and Pacific Railroad Company and certain of its employees represented by the United Transportation Union and the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes.

Following its investigation of the issues in dispute, the Board developed recommendations that were accepted as the basis for a settlement of those issues that separated the parties from agreement.

The Board now has the honor to inform you of a settlement of the issues out of which these disputes arose and to submit its Report concerning the recommendations that led to the settlement.

Respectfully submitted,

James J. Reynolds
Chairman

Ida Klaus
Member

Nicholas H. Zumas
Member

I. CREATION OF THE EMERGENCY BOARD

Emergency Board No. 191 was created by President Carter on September 20, 1979, by Executive Order No. 12159, pursuant to Section 10 of the Railway Labor Act, as amended (45 U.S.C. 160).

The creation of the Emergency Board was based upon the recommendation of the National Mediation Board (NMB) because of the existence of a strike by the United Transportation Union (UTU) and the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (BRAC) against the Chicago, Rock Island and Pacific Railroad Company (Rock Island), which the NMB found was depriving the Middle West of essential transportation service.

The strike followed a long period of unfruitful negotiations between the parties which commenced in early 1977, mediatory efforts by the NMB, rejection of proffers of arbitration, and rejection of the recommendations of a Special Board of Inquiry by one of the labor organizations.

The President appointed the following members of the Board: James J. Reynolds, former Under Secretary of Labor and retired President of the American Institute of Merchant

Shipping, Washington, D. C., chairman; Ida Klaus, member of the New York State Public Employment Relations Board, Attorney and Labor Arbitrator, New York, New York, member; Nicholas H. Zumas, Attorney and Labor Arbitrator, Washington, D. C., member.

II. HISTORY OF THE DISPUTES

The Rock Island is the fourth largest rail carrier of grain in the western region of the United States, operating over some 7,500 miles of track in 13 midwestern states.[1/] Since March 17, 1975, the Rock Island has been in reorganization under Chapter 77 of the Bankruptcy Act under the direction of a trustee appointed by the U. S. District Court for the Northern District of Illinois, Eastern Division.[2/] BRAC represents some 1,600 employees on the Rock Island. UTU represents some 2,500 employees on the property. These employees are organized in three branches: UTU(E) representing firemen, UTU(S) representing switchmen, and UTU(T) representing conductors and brakemen.

1/ Currently, the Rock Island's operations are being conducted by Kansas City Terminal Railway Company under the Directed Service Order of September 26, 1979, issued by the Interstate Commerce Commission.

2/ The Court directed the Trustee on October 10, 1979, to present a plan of reorganization or a plan of liquidation within 60 days.

The BRAC-Rock Island Dispute

On April 1, 1977, pursuant to Section 6 of the Railway Labor Act, BRAC served the Rock Island with a Notice of its desire to revise wages and work rules. On April 28, 1977, an initial conference was held to discuss the revisions sought by BRAC. At this conference, the Carrier informed BRAC that it would not grant the National Railway Labor Conference (NRLC) power of attorney to negotiate wages and work rules on a National basis for the Rock Island. The Rock Island determined to proceed with negotiations separately. The Rock Island did not submit formal Section 6 Notices at that time, but submitted a number of proposed rules changes for informal discussion with BRAC.

During the negotiations in 1977 no agreement was reached. On December 22, 1977, the Rock Island elected to serve formal Section 6 Notices. On January 10, 1978, BRAC served additional Section 6 Notices for concurrent handling. Negotiations on the formal Section 6 Notices began in January 1978 and continued at various times through August 1978, with no agreement.

On August 8, 1978, BRAC invoked the services of the National Mediation Board (NMB).[3/] Mediation sessions were held in January and May of 1979. On June 20, 1979, the NMB

3/ The case was docketed as NMB Case No. A-10313. A companion case involving the Peoria Terminal was docketed as NMB Case No. A-10314.

proffered arbitration, which was rejected by the Carrier and accepted by BRAC. On August 11 and 17, 1979, the NMB resumed "mediation in the public interest" in Washington, D. C.; however, no agreement was reached. On August 28, 1979, BRAC struck the Rock Island.

The UTU-Rock Island Dispute

On January 3, 1977, the three branches of UTU served Section 6 Notices for changes in wages and work rules. An initial conference was held on these Notices on February 1, 1977, at which time it was agreed to suspend further negotiations until a later date. The Rock Island served its Section 6 Notices on August 29, 1977. Supplemental Section 6 Notices were served by the parties between September 1977 and July 1978.

Negotiations between the Rock Island and each of the three branches of UTU were conducted separately. Bargaining with UTU (E & S) commenced in September 1977, and with UTU(T) in October 1977. The negotiations with the three branches continued at various dates through August 1978, and one joint session was held on March 22, 1978. On June 15, 1978, UTU(T) invoked the services of the NMB.[4/] On July 12, 1978, and on August 23, 1978, UTU(S) and UTU(E), respectively, also invoked

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4/ The case was docketed as NMB Case No. A-10324.

the services of the NMB.[5/] Mediation sessions were held on both a separate and joint basis on various dates between September 1978 and March 1979. While these sessions did not produce a settlement, the focus of the dispute was narrowed.

On April 6, 1979, the NMB proffered arbitration to the parties, which was ultimately rejected by both parties. Mediation was resumed on May 21, 1979, and on May 23, 1979, the parties agreed to a mediator's proposal to establish a Special Board of Inquiry to investigate and make recommendations concerning the issue of retroactive pay. The Special Board began hearings on July 26, 1979, and issued its Report and Recommendations on August 27, 1979. Two days later, UTU struck the Rock Island.

Following the strikes by BRAC and UTU, the National Mediation Board held further "mediation sessions in the public interest" on September 11, 1979.

III. ACTIVITIES OF THE EMERGENCY BOARD

The Board convened in Washington, D. C., on October 2, 1979, for on-the-record ex-parte hearings with BRAC and on October 3, 1979, with UTU. Similar on-the-record ex-parte hearings were held with the Rock Island on October 4, 1979, concerning its dispute with BRAC, and on October 5, 1979, concerning its

---

5/ These cases were docketed as NMB Case Nos. A-10303 and A-10287, respectively.

dispute with UTU.

Transcripts and exhibits submitted to the Board were exchanged at the direction of the Board. After a recess to provide time for a careful review of the materials exchanged, the Board commenced a series of off-the-record discussions with the Rock Island on October 11, 1979. A series of off-the-record discussions was commenced with BRAC on October 13, 1979, and with UTU on October 15, 1979. These discussions provided the Board with further views on the issues in dispute, and with reactions to what had been presented by the other side in each of the disputes.

The Board commenced intensive mediation efforts on October 16, 1979. While these efforts were helpful in narrowing the areas of dispute, several key issues remained unresolved. The Board therefore concluded that the best course of action in aiding the parties to reach a final agreement would be to make recommendations and urge their acceptance as a basis for settling all unresolved issues. During the following two days, these recommendations were presented to the parties. On October 18, 1979, they were accepted as a basis for agreement on all unresolved issues.

IV. ISSUES

Out of this long history of unsuccessful negotiations and mediation efforts, there emerged two major issues. On

the one hand, the Rock Island, experiencing severe financial difficulties, was determined to obtain substantial relaxation of work rules which it insisted were inhibiting its ability to effectively operate its rail system. On the other hand was an equally determined adherence by the labor organizations to the preservation of the principle of full retroactivity in this industry. Both BRAC and UTU were seeking application of some benefits of their National wage settlements with NRLC, some aspects of which went back to January 1, 1978.

In the case of BRAC-represented employees, the period of retroactivity ended on October 5, 1979, when BRAC returned to work under the ICC Directed Service Order. In the case of UTU-represented employees, the period of retroactivity ended on May 1, 1979, when National wage rates were implemented on the Rock Island pursuant to the May 23, 1979, agreement reached under the auspices of the National Mediation Board.

As early as 1977, the Carrier contended that it could not and would not pay any retroactive wages because of its precarious financial condition, as evidenced by its bankruptcy and the creditors' demand for liquidation of the railroad. It was the Rock Island's position in negotiations that, while retroactive pay was out of the question, it would, upon necessary rules modifications, pay the National wage scale under the following conditions:

A. The full National wage scale would become effective on January 1, 1978, if settlement was reached in 1977.

B. The full National wage scale would become effective on the first day of the calendar month in which negotiations were concluded, for settlements reached on or after January 1, 1978.

The Rock Island recognized in 1977 that certain unions negotiating at the National level might not reach agreement with the NRLC until some time after January 1, 1978, and that the amount due its employees under the first alternative could not be calculated until National settlement. It did not view payment of the increased wages as retroactive because agreements under the first alternative above were reached prior to the effective dates specified in the National Agreement, and the Carrier had the benefit, as of January 1, 1978, of the rule relief sought. Thus, cost savings could begin to provide the resources needed to pay the National rate, and the funds could be realized pending resolution of the National rate. Five unions settled their negotiations with the Rock Island in 1977 under the first alternative.

Seven unions settled with the Rock Island in 1978 or 1979. In each of those instances, the National wage rate became effective on the first day of the calendar month in which agreement was reached. Retroactivity was "waived" in

the various agreements for periods ranging from two to twelve months. In no case did the Rock Island agree to pay the higher rate retroactive to January 1, 1978, although the Carrier did agree in these negotiations to do so if either BRAC or UTU was successful in obtaining retroactivity. Rock Island based its unwillingness to pay retroactive wages on the ground that if it did not obtain any rule relief from these unions during the retroactive period, it would experience no gain in productivity to help offset the higher operating costs that would result. The Carrier asserted that BRAC and UTU could have received the National wage rate at any time had they been willing to reach agreement on certain proposed rules and rules changes sought by the Rock Island.

Finally, the Carrier asserted that it could not pay retroactive wages, even if it desired to do so, because it had no cash, and would not be able to generate sufficient funds in the foreseeable future. Rock Island estimated that the total cost of retroactivity would approximate $14 million.

BRAC rejected the Rock Island's arguments primarily on the ground that retroactive wage adjustments are a traditional and expected part of collective bargaining in the railroad industry. That Union asserted that the Rock Island has a moral, if not legal, obligation to make the full wage pattern of the National Agreement applicable to the Rock Island.

BRAC also viewed the bargaining context between itself and the Carrier as being substantially different from the negotiations involving the unions that had settled with the Rock Island. It contended that those unions were asked to make minor or insignificant rules changes that had little impact on earnings or employment in those crafts or classes. By contrast, the demands made upon its members would, if granted, lead to a significant reduction in the number of BRAC-represented employees. In particular, BRAC pointed to the Rock Island's proposals regarding the Train Order Rule and the Holiday Work Rule. The greater complexity of the negotiations involving BRAC would, under the best of circumstances, have led to prolonged and difficult negotiations. This being so, it was the Union's position that it was unfair to penalize its members by refusing to consider retroactive wages as an essential part of the final agreement.

The UTU arguments were in many respects similar to those of BRAC. The rules sought by the Rock Island, particularly in the area of Short Haul-Gathering Service, were complex and far more extensive than the rules changes sought from the non-operating unions. The Rock Island-UTU negotiations were further hampered by the need to coordinate the negotiations among the trainmen, enginemen, and switchmen, and by the interrelationship of UTU with other crafts, especially the

Brotherhood of Locomotive Engineers.

Moreover, UTU asserted that the Rock Island's failure to grant retroactivity in December 1973, at the time that all other issues had been tentatively resolved, was the major factor in the mounting retroactivity claim.

Ancillary issues existed in both disputes, generally involving the Carrier's need for productivity savings to generate resources to pay for the settlement.

In the case of UTU, the most important productivity issue was the Rock Island's proposed Short Haul and Gathering Service agreement. The Carrier wanted to institute these new services as a means of generating additional business. Institution of these services would permit the Rock Island to compete more successfully with the trucking industry.

Articles X and XI of the UTU National Agreement were also in issue, because Rock Island wanted the benefits of the relief afforded to other railroads under the National Agreement.

In the BRAC dispute, the Rock Island sought to suspend for a time the penalty provisions of the Train Order Rule, so that operating craft employees could write train orders. The Carrier also wanted to add an exception to the Rule which would make it inapplicable at blind sidings, upon reinstatement of the Rule.

The Rock Island also sought to amend the Holiday Work Rule to eliminate the requirement that every job be filled on a holiday. It also wanted to reduce the entry rates for new employees during the first two years of employment.

BRAC sought to increase per diem and mileage allowances, and to increase the coverage of the Job Stabilization Program by covering employees who entered service on the Rock Island prior to 1972. BRAC also sought to apply the National Agreement on the Rock Island, except to the extent that the parties provided otherwise.

V. THE BOARD'S RECOMMENDATIONS

The Recommendations made by this Emergency Board were predicated on two conditions: (1) That the Rock Island would resume operations as a reorganized viable entity bearing the approval of the ICC and the District Court; and (2) That there would be a relaxation by the labor organizations of certain work rules, and a willingness to accept innovations, both of which would generate additional productivity savings.

These Recommendations set forth below, were accepted by the parties as the basis for settlement.

Emergency Board No. 191 recommends the following settlement of the dispute between the Chicago, Rock Island and Pacific Railroad and the United Transportation Union:

I. Retroactive Pay

A. The Rock Island will pay full retroactivity under the terms of the National Agreement for the period of January 1, 1978, to April 30, 1979, upon assumption of operations by a successor company under a plan of reorganization approved by the Interstate Commerce Commission and confirmed by the U. S. District Court..

B. Payments will be made in sixteen (16) equal monthly installments, beginning during the first month of operations as outlined in paragraph I.A. above.

II. Wages, COLA, Rules

A. The parties agree to adoption of the May 23, 1979, Memorandum of Agreement and Letters of Understanding covering increased wage rates, COLA, and rule changes affecting the UTU (T), (E), and (S) crafts, effective upon assumption of operations.

B. Articles X and XI of the National Mediation Agreement of August 25, 1978, shall be adopted. National interpretations of these articles shall be applied.

C. The Rock Island will withdraw the Carrier's promulgated rules of August 29, 1979, covering the UTU (T), (E), and (S) crafts.

III. Short Haul - Gathering Service

The parties will adopt the May 23, 1979, Short Haul-Gathering Service Agreement. The UTU General Chairmen will meet with the Rock Island to draft the necessary implementing agreements for the principles contained in the Short Haul-Gathering Service Agreement. The parties will negotiate any additional changes, amendments, or clarifications as may be necessary to assure the success of these new services.

IV. Interchange

The parties agree to negotiate a settlement of the "interchange" dispute.

* * * * * * *

Emergency Board No. 191 recommends the following settlement of the dispute between the Chicago, Rock Island and Pacific Railroad and the Brotherhood of Railway and Airline Clerks:

I. Retroactive Pay

A. The Rock Island will pay full retroactivity under the terms of the National Agreement for the period of January 1, 1978, to October 5, 1979, upon assumption of operations by a successor company under a plan of reorganization approved by the Interstate Commerce Commission and confirmed by the U.S. District Court.

B. Payments will be made in sixteen (16) equal monthly installments, beginning in the first month

of operations as defined in paragraph I.A. above.

II. Wages

A. The wage and COLA provisions as set forth in the National Agreement between BRAC and the National Railway Labor Conference, bearing an effective date of January 30, 1979, shall be applied to the employees, to become effective upon assumption of operations. In applying this section, wage increases and COLA due after said start-up date will be applied on the dates set forth in the National Agreement.

B. Article VIII - Entry Rates, of the National Agreement, effective January 30, 1979, is hereby modified to provide for entry rates of 85% of the basic rate during a new employee's first year of service and 92% for the second year of service, effective upon assumption of operations.

III. Per Diem & Mileage

All existing rules and agreements dealing with traveling away from assigned headquarters point will be amended to provide:

(A) Lodging expense provided for in Article I, Section A(3) shall be increased from $4.00 per day to $7.00 per day;

(B) Meal allowances provided for in Article I, Sections B(1), B(2) and B(3) shall be increased from $1.00, $2.00, and $3.00 per day respectively to $1.75, $3.50 and $5.25, respectively;

(C) The allowance for the use of an employee's personal automobile provided for in Article I, Section C(2) shall be increased from twelve (12) cents a mile to fifteen (15) cents a mile; and

(D) The maximum reimbursement for meals and lodging costs provided for in Article II, Section 3 shall be increased from $7.00 per day to $12.25 per day.

IV. Job Stabilization

The applicable Job Stabilization Agreement (February 7, 1967), will be revised and amended to provide:

(A) Employees having an employment relationship with the carrier as of December 31, 1971 shall be placed in protected status;

(B) The protected rates of pay for all employees covered by the revised Agreement shall be the rate of pay of the position occupied on August 1, 1979, or the protected rate in effect, whichever is higher, subject to subsequent increases; and

(C) In instances where employees are drawing furlough allowances, the allowance will be reduced by any compensation the employee receives under the Railroad Unemployment Insurance Benefits Act, and any compensation received from full time employment in outside industry, obtained following the date of furlough.

(D) Any employee on furlough as of the date of assumption of operations will be covered upon return to service.

(E) A protected employee shall have his protected allowance suspended after five years in furlough status, provided, however, that the full protected status of such employee shall be fully restored upon recall to service.

(F) The parties will negotiate guidelines which will be applied in the consolidation of seniority districts.

V. WORK RULES

A. Train Order Relief. During the first 24 calendar months immediately following assumption of operations, BRAC agrees to waive the three-hour and eight-hour penalty provisions of Rule 17 - Train Orders, provided however, that during said 24 month period, no position handling train orders will be abolished because of or as a result of this waiver.

Prior to the end of the 24 month period, the parties will review the experience under the waiver, with a view to possible extension or modification.

Upon expiration of the 24 calendar month period referred to herein, any work diverted from the craft or class here represented will be returned to coverage by this Agreement, at which time the Rule 17, Paragraph 3(2), will be amended to provide the following exception: "3(2)(d) - That when train orders are relayed from the nearest open train order office on the seniority district involved to train or engine service employees at blind sidings."

B. Holiday Work. Article 54 - Holiday Work, will be amended by addition of the following:

(a) When a holiday falls on a work day of a regularly assigned employee and his (her) position is to be worked, the regular employee is entitled to be used.

(b) When necessary work on two or more positions on the same shift is to be performed by one employee, it will be offered in seniority order to employees occupying the positions involved with the highest rate of pay of the position worked.

(c) When positions to be filled are vacant because of the regular occupant being permitted to lay off, or because there is no regularly assigned incumbent on the holiday, the opportunity to fill the vacant position will be offered to qualified regularly assigned employees on the same shift at the same location whose positions were pulled off or combined with others. If not filled in this manner, the vacancy will be filled in accordance with Article VIII or IX of Rule 13.

C. Vacations. The vacation provisions of the National Agreement referred to above will be made effective and applied upon assumption of operations, but in no event earlier than January 1, 1980.

D. The Rock Island will withdraw the Carrier's promulgated rules of August 29, 1979, covering the BRAC-represented employees.

VI. National Agreement

The parties agree that the National Agreement between

BRAC and the National Railway Labor Conference signed on January 13, 1979, and effective nationally on January 30, 1979, shall be applied except to the extent set forth above.

Respectfully submitted,

James J. Reynolds
Chairman

Ida Klaus
Member

Nicholas H. Zumas
Member

APPENDIX D

COMPLAINT OF THE TRUSTEE AND CREDITORS FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

June 5, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, Debtor, WILLIAM M. GIBBONS, as Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; and HENRY CROWN, et al., Plaintiffs, v. THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, Defendants.	In Proceedings for the Reorganization of a Railroad No. 75 B 2697

COMPLAINT FOR DECLARATORY JUDGMENT
AND INJUNCTIVE RELIEF

This action is brought by the Trustee and creditors of the estate of the Chicago, Rock Island and Pacific Railroad Company ("the Rock Island"), which is now in liquidation, to enjoin the enforcement of the Rock Island Railroad Transition and Employee Assistance Act ("the Rock Island Act" or "the Act"). The plaintiffs also seek a declaration that the Rock Island Act is unconstitutional under the Fifth and Fourteenth Amendments to the United States Constitution, on the grounds

that it imposes a debt on the Rock Island estate which constitutes an uncompensated taking of private property for public purposes, and by that and other provisions violates the plaintiffs' due process and equal protection rights, the constitutional separation of powers principle, and the principle that laws respecting bankruptcy must be uniform. In support thereof, the plaintiffs, by their attorneys, state as follows:

Jurisdiction and Venue

1. This Court has jurisdiction under Section 77 of the Bankruptcy Act. Jurisdiction also arises under 28 U.S.C. §1331(a), in that the matter in controversy arises under the Constitution and laws of the United States. This Court also has jurisdiction of this action under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, because the plaintiffs seek a declaration of their rights and further relief concerning an actual controversy otherwise within this Court's jurisdiction.

2. Venue is proper in this District under 28 U.S.C. §1391(e), in that the causes of action alleged involve the United States and its officers and agents acting in their official capacities. The United States of America and the Interstate Commerce Commission both maintain offices in this District in Chicago, Illinois. The Rock Island maintains its principal place of business in this District, and the Rock Island estate owns real property in this District

which would be affected by the actions sought to be enjoined.

3. This action is brought as part of the proceedings for the reorganization of a railroad, In re Chicago, Rock Island and Pacific Railroad Company, No. 75 B 2697 ("the reorganization proceedings"), because it relates to property included in these proceedings.

The Parties

4. Plaintiff William M. Gibbons is Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor ("the Trustee"). The Rock Island is a railroad which the defendant Interstate Commerce Commission has found to be cashless, and therefore without further common carrier responsibilities. Pursuant to the order of the Reorganization Court of January 25, 1980, the Rock Island is now in the process of liquidation under the supervision of the Trustee. The Trustee is responsible for the preservation and disposition of the assets of the Rock Island estate pursuant to Section 77 of the Bankruptcy Act and the orders of the Reorganization Court. Under the Rock Island Act, he is charged with the responsibility for negotiation of an agreement implementing its provisions concerning labor protection. Under Section 106 of the Act, he is subject to an order of the bankruptcy court, which must direct implementation of an employee protection arrangement imposed by the defendant Interstate Commerce Commission. Section 110(b) of

the Rock Island Act provides that obligations guaranteed by the United States government to implement any employee protection arrangement under it "shall be treated as an administrative expense of the estate of the Rock Island Railroad." The Rock Island Act therefore purports to impose on him new obligations which directly conflict with his existing duties to preserve the assets of the estate and the interests of all of its creditors and shareholders and would impair his ability to carry out these duties.

5. The plaintiffs, Henry Crown, et al., hold substantial blocks of Rock Island common stock, first mortgage bonds, and income debentures. The Crown plaintiffs have been found by the Reorganization Court to have a "substantial interest in the Rock Island." They were permitted to intervene in these proceedings, and have actively participated in all other proceedings relating to the Rock Island estate. The interest of the Crown plaintiffs would be substantially impaired by the imposition of $75,000,000 in priority debt for labor protection costs as contemplated by the Act.

6. Plaintiff First National Bank of Chicago ("the First National Bank") appears as Trustee under the First Mortgage Indenture. The imposition of the $75,000,000 administrative expense debt contemplated by the Act may substantially impair the interests of holders of first mortgage bonds, whom it represents as Trustee.

7. Continental Illinois National Bank and Trust Company of Chicago ("Continental Bank") appears as Trustee under the Income Debenture Indenture. The imposition of the $75,000,000 priority debt contemplated by the Act would substantially impair the interests of holders of income debentures, whom it represents as Trustee.

8. The defendant Interstate Commerce Commission is the federal agency responsible under the Rock Island Act for imposing a labor protection arrangement upon the estate of the Rock Island in the event that the unions representing former employees of the Rock Island and the Trustee cannot agree on a labor protection arrangement.

9. The defendant United States of America, acting through the Secretary of Transportation, shall guarantee obligations of the Rock Island incurred through the imposition of labor protection charges under the Act. Obligations guaranteed by the United States under tbe Act would be treated as an administrative expense of the Rock Island estate.

FACTUAL ALLEGATIONS

History of Prior Proceedings

10. The Rock Island filed a petition for reorganization pursuant to Section 77 of the Bankruptcy Act in the District Court for the Northern District of Illinois on March 17, 1975. Despite the protestations of the railroad's

creditors, the Reorganization Court found that a successful reorganization was "not clearly impossible," and authorized the Trustee to pursue an income-based reorganization.

11. From March 1975 through January 1980 the Reorganization Court and the Trustee sought to serve the public interest through reorganization rather than liquidation. During the four and one-half year period from January 1975 through June 1979, the Rock Island suffered losses in excess of $157 million, thereby reducing the value of the creditors' security in at least that amount.

12. During the attempted reorganization period, the jobs of Rock Island employees were preserved, at a cost to the Rock Island of almost one billion dollars in wages and benefits and at a cost to the plaintiff creditors and shareholders in excess of $150 million in operating losses.

13. Despite the critical cash position of the Trustee, on August 28, 1979, its employees struck the Rock Island. On September 20, 1979, the President of the United States appointed an Emergency Board pursuant to Section 10 of the Railway Labor Act, thereby mandating a return to work by the Rock Island employees. The employees defied the law and refused to return to work.

14. As a result of this strike, the cash reserves of the Trustee were further depleted. On September 26, 1979, the Interstate Commerce Commission found the Rock Island to be cashless, rendering its continuing operations impossible, and ordered directed service by the Kansas City

Terminal Railway Company ("the KCT"), and, thereafter, by other companies, to ensure the continued operation of rail service over Rock Island lines.

15. During this period of subsidized directed service, the jobs of all Rock Island employees were preserved through their employment by directed service carriers without regard to the carriers' need for their services. Their employment during this period was directly subsidized by the federal government at a cost to it of over $70 million dollars.

16. After the period for subsidization of directed service under the statute expired on March 23, 1980, the Interstate Commerce Commission authorized non-subsidized "permissive" directed service to continue over Rock Island lines. Such "permissive" directed service operations over some Rock Island lines continues to the present date.

17. Throughout the period during which service over the Rock Island's lines has been maintained under directed service orders, the value of the Rock Island estate has continued to erode. In particular, the estate has not received adequate compensation for the use of its lines and facilities in the public interest.

18. On January 25, 1980, the Reorganization Court found that there was no longer any possibility of an income-based reorganization of the Rock Island, and ordered the Trustee to commence liquidation of the railroad's proper-

ties. Cessation of operations by the Rock Island as a railroad with common carrier responsibilities thus became permanent and complete.

19. As of the date of the Rock Island Act, the Rock Island's obligations as a common carrier had already ceased, and the positions of all but a handful of its former employees had already effectively been eliminated.

20. In its Report to the Reorganization Court Concerning the Proposed Total Abandonment of Rock Island Lines, served May 27, 1980, the defendant Interstate Commerce Commission, the agency charged with administration of the national railway transportation system, recommended that the Court authorize the Trustee "to abandon the entire Rock Island system" and to discontinue service over its lines.

21. On June 2, 1980, after notice and hearing, the Reorganization Court ordered the system-wide abandonment of all Rock Island lines and the discontinuance of all its rail services and obligations as a rail carrier, subject to certain recommendations proposed by the defendant Commission. The Court thus confirmed the prior termination of the common carrier obligation of the Rock Island.

The Rock Island Act

22. The Rock Island Railroad Transition and Employee Assistance Act was signed into law on May 30, 1980. A copy of the Act is attached as Exhibit A to this complaint and incorporated herein.

23. By its terms, the Act becomes effective immediately upon its enactment. It was signed by the President on May 30, 1980.

24. Section 102 of the Act contains a congressional finding that "uninterrupted continuation of services over Rock Island lines is dependent on adequate employee protection provisions", thus stating the purported public purpose of the Act.

25. Section 106 of the Act establishes and creates a new obligation against the estate for "a fair and equitable arrangement with respect to employee protection." This obligation is cumulative with and in addition to employee protection already available to former Rock Island employees under other statutes and agreements.

26. Section 106 requires the railroad and labor organizations representing its employees to enter into a negotiated agreement within 10 days of the enactment of the legislation, which provides "protection for employees who are adversely affected as a result of a reduction in service by such railroad. Such employee protection may include, but need not be limited to, interim employee assistance, moving

expenses, employee relocation incentive compensation, and separation allowances."

27. Section 106(b) requires the imposition of a "fair and equitable" labor protection arrangement by the Interstate Commerce Commission after the 10 day voluntary period has expired. It defines "fair and equitable" as "no less protective of the interests of employees than protection afforded under Section 9 of the Milwaukee Railroad Restructuring Act (45 U.S.C. 908) ["MRRA"]...." This arrangement shall be "imposed" within thirty days of the enactment of the legislation.

28. The employee protective provisions of the MRRA, unlike those in the Rock Island Act, were enacted as part of a statutory plan and in connection with appropriations for the continued operation of core railroad lines.

29. Section 106(e)(2) of the Act provides as follows:

> Benefits and allowances under such agreement or arrangement entered into under this section shall be paid by the Rock Island Railroad from its own assets or in accordance with section 110 of this title, and claims of employees for such benefits and allowances shall be treated as administrative expenses of the estate of the Rock Island Railroad.

Thus, the liabilities created by the Act are administrative expenses of the estate, in preference to certain outstanding claims of creditors and shareholders.

30. Section 110(d) of the Rock Island Act provides that the total liability of the Rock Island under an

employee protection arrangement imposed pursuant to Section 106 "shall not exceed $75,000,000."

31. Section 110 of the Rock Island Act establishes a mechanism by which the Secretary of Transportation "shall guarantee obligations of the Rock Island Railroad" incurred "for purposes of providing employee protection" under Section 106, in a principal amount not to exceed $75,000,000. Under Section 110(b), any obligation guaranteed by the government pursuant to the Act "shall be treated as an administrative expense of the Rock Island Railroad."

32. Section 110(e) of the Act purports to limit the total liability of the United States for obligations incurred by the railroad pursuant to the Act to the guaranteed priority loan under Section 110. Section 110(e) provides as follows:

> Except in connection with obligations guaranteed under this section, the United States shall incur no liability in connection with any employee protection agreement or arrangement entered into under section 106 of this title.

33. In sum, the Rock Island Act creates priority obligations of up to $75,000,000 for new employee protection measures found necessary to meet a public purpose. It imposes upon the estate an involuntary taking or loan in that amount, which is guaranteed by the Secretary of Transportation and which is designated as an administrative expense of the Rock Island estate. That loan would fund an arrangement for payment of labor protection charges imposed

by the Act, whether negotiated by the Trustee under Section 106(a) or imposed by the Interstate Commerce Commission under Section 106(b). The Act provides no mechanism for compensation to the Rock Island estate for obligations incurred under the Act, and purports to eliminate other remedies.

34. Other sections of the Act purport to limit the procedural rights of the Trustee and creditors under the Act.

35. Section 106(c) purports to require the bankruptcy court to authorize and direct the Trustee to implement immediately an arrangement imposed under Section 106(b).

36. Section 106(d)(1) purports to prohibit any stay of an order of the Interstate Commerce Commission or the bankruptcy court which imposes an arrangement under Section 106(b), by the Commission, the bankruptcy court or "any other court".

37. Under Sections 106(b) and (c), the employee protective arrangements which impose the priority obligation under the Act will become effective no later than thirty days after its enactment, with no possibility of a stay.

38. Section 106(d)(2) of the Act purports to limit the right of review of orders implementing Section 106(b). That section provides as follows:

> Any order described in paragraph (1) of this subsection may be appealed only to the court of appeals of the United States having jurisdiction to review decisions and orders of the

> bankruptcy court. Any such appeal to such court of appeals shall be filed within 5 days after the date of entry of the order of the Commission or the bankruptcy court, as the case may be and such court of appeals shall finally determine such appeal within 60 days after the date such appeal is filed. No determination by the court of appeals under this subsection may be reviewed in any other court.

39. The Act imposes additional restrictions on the Trustee in the disposition and use of Rock Island properties.

40. Section 120(a) of the Rock Island Act provides continued directed carrier service without federal government assistance over Rock Island commuter lines which were in operation on March 1, 1980, for a period of two years after the date of the Act. It provides for compensation for the use of Rock Island lines and facilities on terms determined by the Commission to be reasonable. No provision is made for the consent of the Trustee or the approval of the Reorganization Court.

41. Section 120(b) of the Act prohibits the discontinuance of service over a passenger commuter line during the period of directed service.

42. Section 121 provides for "temporary rail banking," by giving the Secretary of Transportation veto power over the scrapping, downgrading or "other disposal" of any line of the Rock Island during the 180 day period following its enactment. However, it provides that the Secretary shall approve the disposition of such lines unless he finds

that there has been a written expression of interest in "purchasing, leasing or rehabilitating the particular rail line or facility for purposes of providing rail service," and that there is a "reasonable expectation that such purchase transaction will be consummated."

43. Section 122 purports to create Commission jurisdiction to authorize "any rail carrier willing to do so voluntarily to use the tracks and facilities of the Rock Island Railroad..." for an indefinite period, under terms of compensation which the Commission finds to be reasonable.

Additional Factual Allegations

44. Since the inception of the reorganization proceedings described in paragraphs 10 through 17 above, the employees of the Rock Island have received five years of labor protection at a cost to the Rock Island estate of almost one billion dollars in wages and benefits and to its creditors in excess of one hundred and fifty million dollars in losses, and at a cost to the federal government in excess of seventy million dollars in directed service subsidies.

45. Employees necessary to the operation of railroad lines over which directed service has been provided by other rail carriers are adequately protected through continued employment by those carriers, and by preferential consideration for other positions on other lines of the interim operating carriers and purchasing carriers. This protection is contractually assured under the terms of a

document known as the "Miami Accords," which was executed on March 4, 1980, by the representatives of labor organizations representing former Rock Island employees and interim and directed service carriers.

46. Employees not protected under the Miami Accords are adequately protected under existing statutory provisions, which include the Railway Unemployment Insurance Act, 45 U.S.C. § 351 et seq. and the Railway Retirement Act of 1974, 45 U.S.C. § 231 et seq. These statutes provide unemployment compensation and other employment protection benefits at a higher level and for longer duration than are available to ordinary workers under most state unemployment insurance plans.

47. The Rock Island Railroad has contributed to funds available for employee protection under these and other statutory plans. See 45 U.S.C. §358. At no time were these contributions to existing statutory employment protection accounts withheld or deferred, so long as the Rock Island's common carrier obligations remained in existence. At no time have benefits otherwise payable under these statutes been withheld or deferred.

48. In addition to existing statutory employment protection, former Rock Island employees may be protected under a variety of union and private contractual labor protection programs.

49. The former employees of the Rock Island are thus protected without the additional protection made available to them under the Rock Island Act.

50. In its Report to the Reorganization Court Concerning the Proposed Total Abandonment of Rock Island Lines, served May 27, 1980, the defendant Interstate Commerce Commission recommended complete abandonment of Rock Island lines. However, it did not recommend the imposition of any labor protection conditions in connection with its approval of total line abandonment. Rather, the Commission specifically declined to recommend the imposition of employee protective conditions equal to or greater than those provided in New York Dock Railway Control--Brooklyn Eastern District, 360 I.C.C. 60 (1970). The Commission pointed out its past practice of refusal to order the imposition of employee protective conditions in entire rail system abandonments.

51. On June 2, 1980, the Reorganization Court ordered the system-wide abandonment of all Rock Island lines. However, the Court found that the imposition of labor protective conditions in connection with the system-wide abandonment was unwarranted under existing law, on the basis of case precedent, and the constitutional and equitable rights of the parties, and specifically directed the Trustee not to pay any employee labor protection or to borrow for that purpose.

52. During the period of reorganization, dividend payments and redemption of the creditors' interests in outstanding Rock Island securities have been suspended and deferred.

53. As of the present date, the assets of the Rock Island, with the imposition of labor protection claims contemplated by the Act, would be clearly insufficient to meet its debt and equity obligations.

54. The employee protection provisions of the Rock Island Act and the other limitations on the disposition of the assets of the Rock Island estate imposed by the Act, confer no benefit upon the Rock Island estate or its creditors, and relieve them of no existing obligation.

55. The imposition of further labor protection costs as an administrative expense against the assets of the estate would result in further impairment of the debt and equity rights of the plaintiff creditors and shareholders.

Count I
(Unconstitutional Taking and Due Process)

56. Plaintiffs reallege and incorporate paragraphs 1 through 55 as paragraph 56 of Count I of this complaint.

57. In this Count, the plaintiffs seek a declaratory judgment, as provided in the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, that the Rock Island Act is unconstitutional, because it violates the prohibition contained in the Fifth Amendment to the United States Constitution

against uncompensated takings of private property for public use, and deprives the plaintiffs of their property without due process of law.

58. An actual controversy which is justiciable in character exists between the plaintiffs and the defendants, as to whether the defendants Interstate Commerce Commission and the Secretary of Transportation may impose prior obligations for the cost of labor protection up to the amount of $75,000,000 upon the Rock Island estate, as set forth in paragraphs 22 through 33 of this Complaint, consistent with the Fifth Amendment's prohibition against uncompensated takings of private property for public use.

59. The imposition of the obligations and debt provided under the Act would impair the plaintiffs' rights and security in the assets of the Rock Island estate, and impose upon the Trustee duties which conflict with his existing responsibility to preserve the assets of the estate.

60. A declaratory judgment as to the constitutionality of the Act's provisions would resolve the controversy between the parties as to the authority of the Commission and the Secretary to impose new costs of labor protection as provided in the Act.

Count II
(Unconstitutional Taking, Due Process and Equal Protection)

61. The plaintiffs reallege and incorporate paragraphs 1 through 55 as paragraph 61 of Count II.

62. This Count alleges an unconstitutional taking of the property of the Rock Island estate and violation of the plaintiffs' due process and equal protection rights in section 110(e) of the Act, which is described and set forth in paragraph 28. That section purports to specifically limit the liability of the United States to the loan guarantees provided for in section 110. It thereby purports to eliminate the remedy otherwise available for claims against the United States under the Tucker Act, 28 U.S.C. § 1491 et seq. The elimination of this right would destroy the plaintiffs' ability to seek compensation for the taking of their property for public use, as set forth in Count I above, and thereby further violate their equal protection and due process rights.

63. By imposing a borrowing obligation of $75 million and related administrative expense upon the assets of the Rock Island estate without conferring any benefit upon the estate or providing any mechanism for compensation to the estate, the Act violates the constitutionally protected property rights of creditors and constitutes a further unconstitutional taking.

64. The plaintiffs seek a further declaration as provided in 28 U.S.C. § 2201, that Section 110(e) of the Rock Island Act, read in light of its other provisions, is unconstitutional under the Fifth and Fourteenth Amendments to the United States Constitution.

Count III
(Unconstitutional Taking)

65. Plaintiffs reallege and incorporate paragraphs 1 through 55 as paragraph 65 of Count III of this complaint.

66. In this Count, the plaintiffs seek a further declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202, as to the constitutionality of the provisions of the Act which purport to limit their remedies and rights of review under the Act.

67. In this Count, the Plaintiffs seek a further declaratory judgment under 28 U.S.C. §§ 2201 and 2202. Specifically, and in light of the findings of cashlessness, impossibility of reorganization and entitlement to abandonment by the Reorganization Court and the Commission, as set forth in paragraphs 14, and 18 through 21, supra, the plaintiffs urge that the Act's provisions which permit continued operation over the Rock Island's lines by other carriers, without the consent or approval of the Trustee and without regard to the rights of creditors, and which otherwise limit the Trustee's right to dispose of the railroad's property, constitute an unconstitutional uncompensated taking of the railroad's property for public purposes, and a deprivation of the property of the Rock Island estate without due process of law.

Count IV
(Due Process and Equal Protection)

68. Plaintiffs reallege and incorporate paragraphs 1 through 55 as paragraph 68 of Count IV of this complaint.

69. Specifically, the plaintiffs maintain that the provisions described in paragraphs 26 through 37 which require the automatic implementation of an employee protection plan imposed by the Interstate Commerce Commission under section 106(b) of the Act within thirty days, combined with the prohibition of a stay of the Commission's order by the Commission, the bankruptcy court, or any other court, makes a violation of the plaintiff's procedural due process and equal protection rights unavoidable because of the unreasonably short time period established for final, unstayable action affecting the property of the estate.

70. The plaintiffs further maintain that the provision described in paragraph 38, supra, which purports to eliminate judicial review of orders of the Commission or bankruptcy court under section 106(b) except for appeals taken within five days to the court of appeals having jurisdiction to review orders of the bankruptcy court, violates their right to due process and equal protection of the laws, under the Fifth and Fourteenth Amendments, in that it deprives them of judicial review of constitutional issues which is available to other citizens. No adequate justification exists for this arbitrary discrimination.

Count V
(Separation of Powers and Equal Protection)

71. The plaintiffs reallege and incorporate paragraphs 1 through 55, supra, as paragraph 71 of Count V of their complaint.

72. The provision described in paragraph 38, supra, infringes the concept of separation of powers upon which the Constitution is based, in that it purports to deprive the Supreme Court of power to decide the constitutionality of Congressional action.

73. The provision described in paragraph 38, supra, which purports to deprive the Supreme Court of jurisdiction to review the constitutionality of the Act, further deprives the plaintiffs of due process and equal protection of the laws, because it would deprive them of judicial review which is available to others. See 28 U.S.C. §2284.

74. The provision described in paragraph 35, supra, which purports to require this Court to enforce an order of the Interstate Commerce Commission, no matter how unreasonable or constitutionally deficient, and to deprive this Court of the power to review or reconsider that order, violates the constitutional principle of separation of powers, in that it purports to deprive this Court or any court of inherently judicial powers, by transferring the jurisdiction to determine whether a debt should be imposed upon a debtor's estate to an administrative agency, and by

infringing upon the Reorganization Court's judicial discretion and full jurisdiction over a pending proceeding. This defect is aggravated by the prohibition of judicial stay of any Commission order which is contained in the Act, as described in paragraph 37, supra.

75. The plaintiffs seek a further declaratory judgment, under 28 U.S.C. §§ 2201 and 2202 that the provisions described in this Count violate the constitutional principles of separation of powers and equal protection as herein stated.

Count VI
(Enactment of a Bankruptcy Law That is Not Uniform)

76. The plaintiffs reallege and incorporate paragraphs 1 through 55 as paragraph 76 of Count VI of this Complaint.

77. Article I, section 8 of the Constitution provides that Congress shall have the power "[t]o establish . . . uniform Laws on the subject of Bankruptcy throughout the United States."

78. Sections 106 and 110 of the Rock Island Act, as described in paragraphs 25 through 38, supra, violate the requirement of Article I, section 8, that laws concerning bankruptcy must be uniform, and the plaintiffs' right to

equal protection of the laws, by imposing labor protection obligations and debts as an administrative expense upon the estate of the Rock Island, which are higher than and different from those imposed on other bankrupt estates.

79. The plaintiffs seek a further declaration by this Court, under 28 U.S.C. §§ 2201 and 2202, that the provisions of the Rock Island Act described in this Count violate the requirement of Article I, section 8 of the Constitution, that laws in bankruptcy must be uniform.

Count VII
(Injunctive Relief)

80. The plaintiffs reallege and incorporate paragraphs 1 through 79 as paragraph 80 of Count VII.

81. This Count seeks temporary and permanent injunctive relief which is necessary to enforce declaratory judgments as to the issues set forth in Counts I through III, as provided under 28 U.S.C. § 2202. Specifically, the plaintiffs request the Court to enjoin the defendant Interstate Commerce Commission from imposing labor protection obligations, and the defendant Secretary of Transportation from imposing or guaranteeing any loans, pursuant to the Rock Island Act, until final determination of the Act's constitutionality.

82. Injunctive relief is necessary to prevent immediate and irreparable harm to the plaintiff's property and constitutional rights. Specifically, under section 106 of the Act, as set forth in paragraphs 33 through 38, supra,

if the labor organization representatives and the Trustee are unable to agree on labor protection terms within ten days of the Act's enactment, the I.C.C. "shall impose" labor protection obligations of up to $75,000,000 on the estate as an administrative expense, within thirty days of its enactment. Section 110 of the Act further provides that payment of obligations imposed by the Commission under the Act would be funded by a priority loan guaranteed by the Secretary of Transportation.

83. If the defendants Commission and Secretary are not enjoined from imposing labor protection orders, charges and administrative expenses upon the estate pursuant to the Act, labor protection obligations and charges will be imposed upon the Rock Island estate within thirty days of the enactment of the Act. As described in paragraph 36 of this Complaint, an order of the defendant Commission imposing such obligations, or an order of the bankruptcy court implementing such an order, may not be stayed in any court.

84. Implementation of such an order would cause plaintiffs injury, in that it would be a taking of the property of the Rock Island estate without just compensation, in violation of their Fifth Amendment rights.

85. The imposition of such an obligation or order would cause the plaintiffs further irreparable injury in that the monies paid under it would be paid to individual

employees and would be recoverable only by a multiplicity of lawsuits, if at all.

86. The harm imposed by the Act would further be irreparable because the Act purports to limit the liability of the United States to the administrative expense loan imposed by the statute, as described in paragraph 32, supra. An order of the Commission imposing labor protection obligations would thus become effective immediately upon its issuance, which could occur as of June 9, 1980, and under the terms of the Act no stay of such an order could then be issued by any Court. The harm suffered by the plaintiffs due to a Commission order would thus be irreparable upon issuance of the order, because the plaintiffs' right to review prior to its implementation is severely limited under the statute.

Prayer For Relief

Wherefore, the plaintiffs, William Gibbons, First National Bank, Continental Bank, and Henry Crown, et al., respectfully pray that this Court grant them relief as follows:

A. Declare the Rock Island Transition and Employee Assistance Act to be unlawful and unconstitutional on the ground that it violates the Fifth Amendment of the United States Constitution because it mandates an unconstitutional taking of the property of the Rock Island estate for public purposes without just compensation.

B. Declare the Rock Island Employee Assistance Act unconstitutional insofar as it violates the due process clause of the Fifth Amendment and the equal protection provisions of the Fifth and Fourteenth Amendments, and the Constitutional doctrine of separation of powers.

C. Issue a preliminary and permanent injunction, enjoining the defendant I.C.C. from entering an order under the authority granted to it by the Act, imposing labor protection on the estate of the Rock Island, and enjoining the defendant and Secretary of Transporation from imposing a loan to fund any labor protection provision under the Act.

D. Award plaintiffs their costs and attorneys fees.

E. Grant such further relief as the Court deems just and appropriate.

Respectfully submitted,

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Attorney for William M. Gibbons
Trustee of Chicago, Rock Island & Pacific Railroad Company

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By _____
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June 5, 1980.

APPENDIX E

AFFIDAVIT OF WILLIAM M. GIBBONS

June 5, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, Debtor, WILLIAM M. GIBBONS, as Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; and HENRY CROWN, et al., Plaintiffs, v. THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, Defendants.	In Proceedings for the Reorganization of a Railroad No. 75 B 2697

AFFIDAVIT OF
WILLIAM M. GIBBONS, TRUSTEE

This Affidavit is submitted in support of the Trustee's Motion for a Temporary Restraining Order against implementation of the Rock Island Act pending resolution of the constitutional questions raised in the Complaint filed as of this date. In support thereof, the affiant states as follows:

1. I, William M. Gibbons, am Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor, pursuant to an Order of this Court of March 28, 1975.

2. As Trustee, pursuant to the Order of this Court and Section 77 of the Bankruptcy Act, it is my fiduciary duty to preserve the assets of the estate for the benefit of its creditors.

3. Under an Order of this Court of January 25, 1980, it is my responsibility to proceed with the liquidation of this estate.

4. Under the Order of this Court of June 3, 1980, it is my responsibility to effect the abandonment of lines and discontinuance of service by the Rock Island Railroad. In connection therewith, this Court has prohibited me from entering into any agreements or obligations imposing labor protection costs on the estate.

5. Under Section 106 of the Rock Island Transition and Employee Assistance Act, which was signed into law on Friday, May 30, 1980, I may enter into a labor protection agreement with representatives of labor organizations which represent the former employees of the Rock Island.

6. If I do not enter into a voluntary agreement on behalf of the estate with labor representatives within 10 days of the Act's enactment - that

is, by Monday, June 9, 1980 - I will become subject to an order of the defendant Interstate Commerce Commission (the "Commission") to implement a labor protection arrangement imposed by the Commission.

7. Any involuntary arrangement imposed by the defendant Commission concerning labor protection under the Act will become an administrative expense against the assets of the estate. Under the terms of the Act, the cost of such an arrangement may amount to $75,000,000.

8. The $75,000,000 cost of the labor protection arrangement which may be imposed by the Commission will be imposed on the estate through an involuntary taking or loan guaranteed by the federal government which will be an administrative expense against the assets of the estate.

9. Under Section 106(b) of the Act, the defendant Commission will have jurisdiction to impose the labor protection arrangement commencing Monday, June 9, 1980.

10. The duties mandated of me by the Act to implement the labor protection arrangement imposed by the Defendant Commission directly conflict with my duties to preserve and liquidate the assets of the estate for the highest and best values obtainable and will dilute the value of those assets available for the creditors and shareholders.

11. The Act further provides that this Court shall order me to implement an Interstate Commerce Commission arrangement without review of that arrangement by this Court. Under the Act, there may be no stay of a labor protection arrangement imposed by the Interstate Commerce Commission by this or any other Court. The costs of the labor protection arrangement imposed by the Interstate Commerce Commission would have administrative expense status and would not be subject to judicial review prior to implementation. The Interstate Commerce Commission jurisdiction and the imposition by the Commission of a labor protection arrangement under the Act would thus result in irreparable injury to the estate.

12. The estate would also suffer irreparable injury by the implementation of a labor protection arrangement under the Act because the payments required would be to numerous individuals and would be recoverable only through numerous lawsuits if at all.

13. I have read the Complaint for Declaratory Relief and a Preliminary Injunction which was filed on this date in these proceedings, and state that the allegations as to the matters contained therein are

true and complete to the best of my knowledge, information and belief.

Further affiant sayeth not,

WILLIAM M. GIBBONS, Trustee
Chicago, Rock Island and
Pacific Railroad Company,
Debtor

SUBSCRIBED AND SWORN to
before me this 5th day
of June, 1980.

Notary Public

APPENDIX F

BRIEF OF THE APPELLEES, THE TRUSTEE AND CREDITORS OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

IN RE CHICAGO, R.I. & P. R.R.

NOS. 80-2487 and 80-2636 (7th Cir.)

November 10, 1980

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 80-2487 and 80-2536

In the Matter of: CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, Debtor.	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Appeals of: RAILWAY LABOR EXECUTIVES' ASSOCIATION; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, Defendants-Appellants.	No. 75 B 2697 Hon. Frank J. McGarr, Judge

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BRIEF OF THE APPELLEES, THE TRUSTEE AND CREDITORS OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

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Michael C. Kim
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DATED: November 10, 1980

CERTIFICATE OF INTEREST

The undersigned, counsel of record for WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor, furnishes the following list in compliance with Circuit Rule 5(b):

1. Undersigned attorney of the law firm of Williams, Manos, Rutstein, Goldfarb & Sharp, Ltd., represents William M. Gibbons, as Trustee, in the above-captioned proceeding and has represented Mr. Gibbons in the District Court throughout the reorganization proceedings.

2. Not applicable.

3. The law firm of Malato, Stein & Grossman has appeared in the District Court as special counsel for William M. Gibbons in a matter not related to the above-captioned Appeal.

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NICHOLAS G. MANOS
Attorney for William M. Gibbons, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor.

CERTIFICATE OF INTEREST

The undersigned counsel of record for Henry Crown, et al., plaintiffs-appellees, furnish the following list in compliance with Circuit Rule 5(b). Henry Crown, et al. include the following individuals and corporations:

H.N. Wyatt, as Trustee under Trust Agreement dated July 11, 1963

H.N. Wyatt, as Trustee under Trust Agreement dated July 22, 1963

H. N. Wyatt, as Trustee under Trust Agreement dated December 2, 1964

Florence C. Rothman, Irving Crown, and Irving Crown, Executor under the ast Will of Edward Crown, as Trustee under Trust Agreement dated May 29, 1962

Henry Crown

Gladys K. Crown

Henry Crown & Company, Not Incorporated

Areljay Company, Not Incorporated

Irving Crown

The Crown Fund, an Illinois partnership

Arie & Ida Crown Memorial, an Illinois not-for-profit corporation

Irving Crown, Lester Crown, Henry Crown, Milton Falkoff and Arnold Sobel, as Trustees under Trust Agreement dated October 1, 1965

Evelyn Green

Daniel R. Murray

November 10, 1980

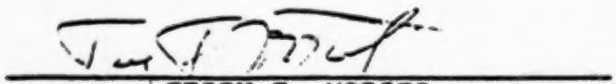
CERTIFICATE OF INTEREST

The undersigned, counsel for THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee, furnishes the following list in compliance with Circuit Rule 5(b):

1. The First National Bank of Chicago, as Indenture Trustee, is the only party represented by us in this Appeal.

2. Not applicable.

3. The law firm of Rudnick and Wolfe currently represents The First National Bank of Chicago, as Indenture Trustee. During the period from March 1975 through August 1979 The First National Bank of Chicago was represented by Isham, Lincoln & Beale.



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CERTIFICATE OF INTEREST

The undersigned, counsel of record for Continental Illinois National Bank and Trust Company of Chicago, as Indenture Trustee, furnishes the following list in compliance with Circuit Rule 5(b):

(1) Undersigned attorneys solely represent Continental Illinois National Bank and Trust Company of Chicago ("CINB"), as Indenture Trustee, in this appeal proceeding (Docket Nos. 80-2487 and 80-2536).

(2) CINB is a National Banking Association. Its parent corporation is Continental Illinois Corporation.

(3) Mayer, Brown & Platt has served as sole counsel for CINB, as Indenture Trustee, through its Corporate Trust Division, throughout the railroad reorganization proceedings entitled "In the Matter of the Chicago, Rock Island and Pacific Railroad Company, Debtor" in the United States District Court for the Northern District of Illinois, Eastern Division, Docket No. 75 B 2697. CINB's Commercial Banking Division has at times been represented by Schwartz, Cooper, Kolb & Gaynor, Chtd., 33 North LaSalle Street, Chicago, Illinois 60602. CINB's Commercial Banking Division is not a party to this appeal proceeding.

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Harold L. Kaplan
One of the Attorneys for
Continental Illinois National
Bank and Trust Company of Chicago,
as Indenture Trustee

DATED: November 10, 1980

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Nos. 80-2487 and 80-2536

In the Matter of: CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, Debtor. Appeals of: RAILWAY LABOR EXECUTIVES' ASSOCIATION; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, Defendants-Appellants.	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 75 B 2697 Hon. Frank J. McGarr, Judge

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BRIEF OF THE APPELLEES, THE TRUSTEE AND CREDITORS OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

This brief is submitted by Appellees William M. Gibbons, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor ("Trustee"), Continental Illinois National Bank and Trust Company of Chicago and The First National Bank of Chicago, as Indenture Trustees, and Henry Crown, et al., substantial holders of first mortgage bonds, income debentures and common stock of the Chicago, Rock Island and Pacific Railroad Company ("creditors and shareholders").

ISSUES PRESENTED

This appeal from Judge McGarr's denial of the Appellants' Motions to Vacate on October 15, 1980, presents only one issue for review:

> Does the addition of the new Section 124(c) of the Rock Island Act which states that '[n]othing in this Act ... shall limit the right of any person to commence an action ... under ... the Tucker Act', or any other amendment to the Rock Island Act, correct the Act's unconstitutionality under the due process and governmental taking provisions of the Fifth Amendment to the United States Constitution?

Addtional issues raised with regard to Judge McGarr's June 9, 1980 injunction, which are already before the United States Supreme Court, are as follows:

> (1) Do the Rock Island Act's employee protection provisions violate the fifth amendment to the United States Constitution through their uncompensated taking of the private property of the Rock Island estate for a purported public purpose and without due process of law?
>
> (2) Does the Rock Island Act's employee protection scheme violate the due process, separation of powers and uniformity in bankruptcy provisions of the United States Constitution by its summary taking of the estate's property?

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*/ The Trustee, creditors and shareholders intend to submit a separate memorandum in response to the stay motion filed by the Appellant RLEA on November 7, 1980. That memorandum will address the question, not addressed in this brief, whether Judge McGarr properly exercised his discretion by enjoining the implementation of the Rock Island Act to prevent the immediate and irreparable harm which the Act's implementation would impose on the estate.

NATURE OF THE CASE

This case involves a second attempt by Congress to impose the $75,000,000 cost of a newly created labor protection scheme on the Rock Island estate. The first attempt, the Rock Island Railroad Transition and Employee Assistance Act, Pub. L. No. 96-254, 45 U.S.C. § 1001, et seq. (the "Rock Island Act"), was declared unconstitutional by Judge Frank J. McGarr, who enjoined its implementation and enforcement. The Railway Labor Executives' Association subsequently sought a stay of Judge McGarr's order from Justice Stevens. That request was denied first by Justice Stevens, and thereafter by the full Supreme Court. Railway Labor Executives' Association v. Gibbons, 100 S. Ct. 2668 (Stevens, Circuit Justice, June 28, 1980,); 100 S. Ct. 3057 (July 2, 1980), appeal docketed (U.S. S. Ct. September 15, 1980).

Displeased with the judicial determination of the unconstitutionality of its labor protection scheme, Congress reenacted the same scheme with minor modifications as part of the Staggers Rail Act of 1980, Pub. L. No. 96-448 (October 14, 1980), § 701 et seq. (the "Staggers Rail Act"). Finding the modifications to the Rock Island Act made by the Staggers Rail Act to be purely cosmetic, Judge McGarr refused to vacate his preliminary injunction. This appeal arises from that order.

JURISDICTIONAL SUMMARY

The Trustee, creditors and shareholders respectfully submit that this Court should decline to consider these appeals because, an appeal of Judge McGarr's June 9, 1980 Order having been taken to the United States Supreme Court under 28 U.S.C. § 1252, all subsequent appeals from that Order are already before the United States Supreme Court. The position of the Trustee, creditors and shareholders as to this Court's jurisdiction over these appeals is explained in their Motion to Dismiss or Certify now pending before this Court. However, should this Court determine that it will hear these appeals, the law of this case remains that the Rock Island Act employee protection scheme is fundamentally unconstitutional. Thus, the only issues which this Court may properly review concern the propriety of Judge McGarr's October 15, 1980 ruling that the procedural changes made by the Staggers Rail Act amendments are merely "cosmetic".*/

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*/ The issues raised by the October 15 Order by which Judge McGarr addressed the Appellants' arguments as to the effect of the Staggers Rail Act Amendments are addressed in Part II of this Brief. Although it seems clear that this Court should not reexamine Judge McGarr's initial determination as to the basic constitutional faults of the Rock Island Act scheme, the Trustee, creditors and shareholders have addressed issues concerning the June 9 Order in Part I of this brief.

Rock Island lines for the ensuing five years despite the repeated objections of the creditors and shareholders. Although the estate incurred devastating losses, the Trustee and Reorganization Court sought to serve the public interest in continued rail operations through an income-based reorganization. The Trustee pursued the prospect of achieving an income-based reorganization by seeking, albeit unsuccessfully, federal loan assistance for rehabilitation of track and rolling stock and more efficient work rules agreements with labor organizations representing Rock Island employees.

Since 1965 the Rock Island has sustained losses of over $280 million -- more than a quarter of a billion dollars.*/ In 1978, after year-end financial adjustments, the Rock Island lost $21.2 million on an ICC accounting basis and $17.9 million on the Trustee's own depreciation accounting basis. During the first nine months of 1979 the Rock Island lost a staggering $66.2 million on an ICC accounting basis

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[Footnote continued from preceding page.]

References to the Appendix of the Trustee and Creditors, filed herewith, hereinafter appear as "Tr. App."; references to the Short Appendix To Brief for Appellant Railway Labor Executives' Association, filed October 27, 1980, as "RLEA App."; references to Appendix to the Brief for Appellant United States of America, filed October 28, 1980, as "Govt. App."; and references to the Appendix to the Brief for the Interstate Commerce Commision, filed October 28, 1980, as "ICC App."

*/ Response of the Intervenors' Crown et al. To Trustee's Report for 1978 and Four Months 1979, at pp. 26-34 (September 6, 1978) (Tr. App. B-30-38); Income Statements, 1975-79 (Tr. App. A-1-15).

and $67.7 million on the Trustee's depreciation accounting basis. Through September 1979, accumulated losses during the reorganization years exceeded $178.4 million on an ICC accounting basis basis and $148.3 million on a depreciation accounting basis. These losses were accompanied by accelerating erosion of the Trustee's cash reserves. By the summer of 1979, these reserves had dwindled to a point at which the Trustee could no longer pay his operating expenses.*/

These large losses suffered by the Rock Island estate, its creditors and shareholders enabled the employees of the Rock Island to continue their employment with the Rock Island for almost five years after the filing of the reorganization petition at a cost to the estate of almost one billion dollars in wages and benefits.**/

B. The Strike

Despite the Trustee's dire financial straits, on August 28, 1979, the Brotherhood of Railway and Airline

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*/ Response of Intervenors' Crown et al. To Trustee's Report for 1978 and Four Months 1979, at pp. 52-55 (Tr. App. B-56-59); ICC Directed Service Order No. 1398, Appendix A (Tr. App. C-45).

**/ Complaint for Declaratory Judgment and Injunctive Relief, at p. 6, para. 12 (June 5, 1980) Affidavit of William M. Gibbons, Trustee, at pp. 4-5, para. 13 (June 5, 1980) (Govt. App. Document No. 9).

Clerks ("BRAC") and the United Transportation Union ("UTU") (represented in these proceedings by the Appellant RLEA) struck the Rock Island. The strike had its genesis in the efforts of the Trustee to obtain his employees' agreement to work rules changes that would result in substantial productivity savings for the Rock Island.*/ The Trustee's efforts to eliminate antiquated, highly inefficient work rules with which rail labor has plagued the entire rail industry for decades were critical to the success of his productivity improvement program and his efforts to achieve an income-based reorganization.

As early as April of 1977, the Trustee advised BRAC and other unions representing Rock Island employees that he would not grant the National Railway Labor Conference his power of attorney to negotiate wages and work rules on a national basis along with other railroads throughout the country. Rather, he would conduct his own separate

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*/ The Rock Island had long suffered from an abnormally high operating ratio -- the ratio of a railroad's operating expenses to its total operating revenues -- a key measure of the efficiency with which a railroad conducts its operations. The Rock Island reported an operating ratio exceeding 80% in all but one year of the decade preceding reorganization. At the outset of these proceedings, the Trustee projected that operating ratios would move to a markedly more efficient level of approximately 75% for each of the years 1976 through 1980. Brief of Intervenors-Appellants Crown, et al., at 37-42, In re Chicago, R.I. & P.R.R., 545 F.2d 1087 (1976). In the first three years of reorganization, 1975-1977, the operating ratio averaged an inefficient 86.6%. The operating ratio subsequently surpassed 100%, reflecting in part the Trustee's inability to secure agreement for meaningful work rules changes. Income Statements, 1975-79 (Tr. App. A-1-15).

negotiations in order to obtain substantial changes of work rules which inhibited his ability to operate the Rock Island's rail system efficiently. The Rock Island Trustee took the position that he would not agree to wage increases for employees represented by BRAC, or any other union, unless and until more efficient work rules were agreed upon and implemented. The Trustee's position was necessarily firm because the financial position of the Rock Island was so precarious that wage increases of the magnitude sought by BRAC and the other unions could be funded only out of productivity savings achieved by overhauling antiquated rail labor work rules.*/

Five unions representing Rock Island employees reached agreement with the Trustee in 1977. Because more efficient work rules accepted by these unions took effect on or prior to January 1, 1978, the Trustee agreed to pay wage scales agreed to by the National Railway Labor Conference beginning January 1, 1978. These wage increases would be funded by cost savings effected by the more efficient work rules. Seven other unions representing Rock Island employees settled with the Trustee after the effective date of the new nationally negotiated wage scale. In each case the national wage scale became effective on the first day of the month in which agreement was reached. Thus, in each instance the new

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*/ Report of Emergency Board No. 191, at pp. 2-7 (October 22, 1979) (RLEA App. 87, 90-95).

wage scale took effect concurrently with the implementation of more efficient work rules.*/

Despite the fact that every other union representing Rock Island employees agreed to work rules changes that would take effect concurrently with and thus fund nationally negotiated wage increases, the two largest unions, BRAC and UTU adamantly refused to agree to any work rules changes unless their members received wage increases retroactive to January 1, 1978. In the words of the Emergency Board subsequently appointed by the President to study this dispute:

> BRAC rejected the Rock Island's arguments primarily on the ground that retroactive wage adjustments are a traditional and expected part of collective bargaining in the railroad industry.

Report of Emergency Board No. 191, at page 9 (RLEA App. 97) (emphasis added).**/

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*/ Id. at 7-9 (RLEA App. 95-97).

**/ Other issues, generally involving BRAC's refusal to agree to more efficient work rules sought by the Trustee, also divided BRAC and the Trustee. BRAC expressed concern that the Trustee's efforts to eliminate widespread featherbedding would lead to a significant reduction in the number of BRAC-represented employees. UTU took positions similar to those maintained by BRAC. Ibid., at 10-12 (RLEA App. 98-100). However, UTU proved to be slightly more moderate than BRAC. Shortly before the strike, UTU reached an interim agreement with the Rock Island Trustee under the auspices of the National Mediation Board. Despite this apparent progress, BRAC initiated its strike against the Rock Island one day after a Special Board of Inquiry agreed to by the Trustee and UTU issued its report. Ibid., at 3-5 (RLEA App. 91-93).

By June 30, 1979, shortly before BRAC and UTU struck the Rock Island, the cash and short-term investments of the Rock Island had declined to a mere $3.0 million from a level consistently above $16 million in prior reorganization years.*/ Even more ominously, the Trustee reported a rapidly growing net working capital deficit that totalled $52.2 million on June 30, 1979.**/ The Trustee estimated

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*/ The Trustee publicly reported cash and short-term investments as follows:

Date	Amount (in millions)
March 17, 1975	6.8
December 31, 1975	20.8
December 31, 1976	19.6
December 31, 1977	16.4
December 31, 1978	16.6
June 30, 1979	3.0

Response of Intervenors Crown et al. To Trustee's Report for 1978 and Four Months 1979, at p. 54 (September 6, 1979) (Tr. App.B-58). These figures were filed regularly with the reorganization court and were well-known to BRAC and UTU.

**/ Id. at 50 (Tr. App. B-54). The following figures were publicly reported, and thus known by BRAC and UTC:

	Net Working Capital (Deficit) (millions)
March 16, 1975	20.2
December 31, 1975	16.6
December 31, 1976	7.8
December 31, 1977	(9.7)
December 31, 1978	(26.2)
June 30, 1979	(52.2)

Net working capital is the difference between short-term assets and short-term liabilities. The Trustee offered to open his books to examination by auditors selected by RLEA and UTU to confirm this bleak state of affairs, but this invitation was never accepted.

that the total cost of the retroactive pay sought by BRAC and UTU would approximate $14 million.*/ In light of the estate's rapidly declining cash position, it was abundantly clear that the Trustee did not have $14 million to pay out for any purpose.

Despite this dismal state of affairs, BRAC refused to agree to more efficient work rules and to eliminate costly featherbedding practices. On August 28, 1979, BRAC struck the Rock Island. One day later, UTU also struck the Rock Island. Because the Trustee could not carry on operations with a partial work force and sought an orderly shutdown of operations, he issued notices of discharge or suspension to his contract employees in accordance with his collective bargaining agreements.

On September 20, 1979, the President of the United States appointed an Emergency Board pursuant to Section 10 of the Railway Labor Act, 45 U.S.C. § 151, et seq., thereby

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*/ Id. at 9 (RLEA App. 97). The other unions representing Rock Island employees insisted upon including in the agreements they reached with the Trustee a so-called "most-favored nation" clause -- i.e., if the Trustee granted retroactive pay to any union, he must grant it to all unions. Thus the retroactivity sought by BRAC and UTU would be extended to all employees of the Rock Island -- a fact well known to BRAC and UTU. Id.

mandating a return to work by the Rock Island employees.*/ The next day, in the presence of counsel for BRAC and UTU, Judge McGarr analyzed the situation resulting from the Presidential order:

> The problem we have with it now is that presumably by Presidential Order the strike is over and everybody is supposed to go back to work. It is unfortunate that the Unions are playing 'dog in the manger' and pretending they don't know about this and that they are not going to acknowledge it until they are served and so forth. Sooner or later I suppose somebody is going to read the order and they are going to have to catch them and they are going to have to comply with it, and I can make no assumption other than that they will comply with it. However unhappy they may be with it I am sure the Unions like everybody else are going to obey a Presidential Order and I would hope and expect that they would sit down immediately and that they would discuss with the Rock Island the mechanics for getting them back to work and getting the Railroad running again. Any other result would surprise me.

Transcript of Proceedings, September 21, 1979, at 21; see also id. at 11.

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*/ Report of Emergency Board No. 191 (RLEA App. 87). On September 21, 1980, the Trustee sent a telegram to Fred Kroll, President of BRAC, and to A. H. Chesser, President of UTU, indicating the Trustee's intention to comply with the Presidential back-to-work order and inviting their compliance. UTU President Chesser responded by telegram on September 21, 1979:

> Upon receipt of official notification of President Carter's Executive Order and appointment of an emergency board we will advise you of the UTU return to work arrangements.

Transcript of Proceedings, September 21, 1979, at 9-10. BRAC did not respond. Id.

Contrary to Judge McGarr's expectations, the unions never ordered their members to return to work until the initiation of directed service. The United States made no attempt to enforce the President's order. Either the Government never served the union leaders with notice of the Presidential Order, which is unlikely indeed, or the unions simply chose to defy the law.

C. Cashlessness and Directed Service

The strike ran its predictable course. Though a management team attempted to carry on limited service, the Rock Island effectively ceased operations. The very limited cash reserves of the Rock Island were quickly exhausted. On September 26, 1979, the Commission ordered the Kansas City Terminal Railway Co. to operate and provide directed service over the lines of the Rock Island, based upon "the specific finding that [the Rock Island's] cash position makes its continuing operation impossible," and that the Rock Island "suffers from the type of 'cashlessness' described in 49 U.S.C. § 11125(a)(1)." Directed Service Order No. 1398, 44 Fed. Reg. 56,343 (1979) (Tr. App. C-1). Even with the implementation of directed service by the Commission, however, the Rock Island workers represented by BRAC refused to return to work until the Commission agreed that their entire membership would be employed in directed service

operations, regardless of need and no matter how great the resulting increase in the cost of directed service.*/ As a result of the Commission's directed service orders, the employment of most Rock Island workers was extended for an additional six months, at a cost to the Government of over $70 million.**/

Since the date of the initial directed service order, the Rock Island has had no railroad operations. Rock Island lines have been operated only by other carriers under Commission orders or Commission-sponsored lease arrangements.

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*/ ICC Directed Service Order No. 1398, Supplemental Order No. 2 (October 3, 1979) (Tr. App. D-1). This had the effect of materially increasing the cost of directed service, thereby insuring that no rental would be paid the Rock Island for the use of its lines in directed service (since Commission rules provided for the payment of rental for lines only in the event that the directed rail carrier earned a profit on directed service operations). Incredibly, at the same time BRAC successfully insisted upon the immediate rehiring of all of its membership, no matter how costly or wasteful, the unions also won, as a part of the price they exacted from the ICC for their agreement to return to work, a promise from the Acting Chairman of the ICC that the directed rail carrier would "examine the applications for employment of all executive officers employed by the Rock Island with the utmost care." Id. (Tr. App. D-4)

**/ Complaint for Declaratory Judgment and Injunctive Relief, at p. 14, para. 44 (June 5, 1980); Affidavit of William M. Gibbons, Trustee, at pp. 4-5, 13 (June 5, 1980) (Govt. App. Document No. 9).

D. Liquidation and Abandonment

Although directed service took the operating responsibility for the Rock Island out of his hands, the Trustee, pursuant to Judge McGarr's direction, proceeded to prepare a plan of reorganization. On December 28, 1979, the Trustee filed his Plan of Reorganization, which called for the formation of an operating core railroad and a reorganization built around that core. On January 21, 1980, Peat, Marwick, Mitchell & Co. ("Peat, Marwick"), the court's expert, filed its report, which concluded that the Rock Island was not reorganizable even if pared to its most profitable core.*/

Based upon the Rock Island's long history of continuing losses, the conclusion of Peat, Marwick, and the urgings of the Creditors, now joined by the Government, Judge McGarr found that "a continuation of the Rock Island on an income producing basis, whether in core or in whole or in part . . . is just not possible. . . ." Transcript of Proceedings, January 25, 1980, at 100. (RLEA App. 38.) Judge McGarr instructed the Trustee "to continue his present plans for cessation of operations by the time of the anticipated termination of the directed service order" and "to prepare and file with the Court a preliminary plan of liquidation. . . ." Transcript of Proceedings, January 25, 1980,

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*/ Report of Peat, Marwick, Mitchell & Co., at X-1 through X-16 (January 21, 1980).

at 97. (RLEA App. 35.) The Trustee commenced liquidation as ordered by Judge McGarr.

On May 27, 1980, pursuant to Section 1170 of the Bankruptcy Code, 11 U.S.C. § 1170, the Commission filed an advisory report with the Reorganization Court in which it found:

> We conclude that abandonment of the Rock Island and its dissolution as an operating railroad is required by the public convenience and necessity. We have reviewed the carrier's present financial position and future prospects and conclude that it has no realistic hope for reorganization or continued public service in its present form. The extremely deteriorated condition of its plant and severe erosion of its traffic base (through interrupted and uncertain operations) make it clear that the Rock Island will not be able to recover. Consequently, fairness to its creditors and stockholders dictates that the carrier be liquidated.

Chicago, Rock Island & Pacific Railroad Co. - Abandonment, Interstate Commerce Commission Report, Docket AB-46 (Sub-No. 22) (May 27, 1980), at 3-4. (Tr. App. E-33.)

On June 2, 1980, after the submission of briefs by interested parties and oral argument, Judge McGarr confirmed the total abandonment of all Rock Island lines and service on precisely the terms recommended by the Commission. He thus reaffirmed his decision of January 25, 1980, that the Rock Island had no further common carrier obligations. Judge McGarr found:

> [T]hat Rock Island's unconditional discontinuance of service and its total system abandonment is constitutionally mandated

> and . . . that to force a railroad to continue operations indefinitely at a loss in order that the public may be served is a violation of the Fifth Amendment rights of those who have a security interest in the enterprise. Brooks-Scanlon Co. v. Railroad Commission, 251 U.S. 396 (1920).

In its report of May 27, 1980, the Commission specifically referred to a long line of cases in which it had declined to impose labor protection conditions on total line abandonments. Consistent with these precedents, it declined to recommend that the Reorganization Court impose employee protection conditions on the Rock Island's total line abandonment. On June 2, 1980, Judge McGarr also found:

> [C]onsistent with ICC precedent, with the Rock Island's constitutional right to abandon its lines and discontinue its service, and with the equities of the Rock Island situation, no labor protection arrangements may be imposed on the Rock Island estate. . . .

Judge McGarr accordingly ordered:

> That no claim or arrangement of any kind or nature for employee labor protection payable out of the assets of the Debtor's estate is allowed or required by this Court pursuant to Section 17 of the Milwaukee Railroad Restructuring Act and the Trustee is hereby directed not to pay any such claim or to borrow for such purpose, any and all such claims or arrangements being hereby denied and prohibited by the Court.

Order No. 248 (June 2, 1980) (Govt. App. Document No. 4).*/

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*/ The RLEA subsequently twice sought a stay of that order by this Court. On each occasion this Court denied RLEA's request. In re Chicago, Rock Island & Pacific Railroad Company, appeal pending, No. 80-1788, unpublished orders, (7th Cir., June 19 and September 18, 1980).

II. THE ROCK ISLAND ACT

A. The Rock Island Act Scheme.

On May 30, 1980, the President signed the Rock Island Act. In the preamble of the Act Congress found:

> (1) uninterrupted continuation of services over Rock Island lines is dependent on adequate employee protection provisions covering Rock Island Railroad employees who are not hired by other railroads;
>
> (2) for those Rock Island Railroad employees not hired by other rail carriers, there is no other practicable means of obtaining funds to meet the necessary costs of such employee protection that are assumed by the Rock Island Railroad;
>
> (3) a cessation of necessary operations of the Rock Island Railroad would have serious repercussions on the economies of the States in which such railroad principally operates; and
>
> (4) premature cessation of services over lines which are the subject of pending purchase application[s] would result in harm to the shipping public and could imperil continuation of vital commuter service.

Rock Island Act, Section 102. To avoid these perceived evils, Section 106 of the original Rock Island Act required the Trustee and labor unions representing former employees of the Rock Island, within ten days of the Act's enactment, to negotiate and enter into an agreement providing for up to $75,000,000 of labor protection payments to former employees. In the event that no "voluntary" agreement could be reached, Section 106(b) required the Commission to "impose" a labor protection arrangement on the Rock Island estate that is "no less protective of the interests of employees" than the

arrangement imposed on the Milwaukee Railroad by Section 9 of the Milwaukee Railroad Restructuring Act (45 U.S.C. § 908) (the "MRRA"). Section 110 of the Rock Island Act required the Trustee to borrow up to $75,000,000 to cover the costs of labor protection under Section 106.

The Act further provided that all employee claims for labor protection benefits must be treated as administrative expenses of the estate (Section 106(e)(2)) and that the $75,000,000 borrowing must also be treated as an expense of administration of the estate. (Section 110(b))

Section 110(e) of the Act eliminated any liability on the part of the United States in connection with any employee protection arrangement imposed under the Act. Section 106(c) provided that the reorganization court "shall" order the Trustee to implement the arrangement devised by the Commission "immediately" upon issuance of the Commission's order. Section 106(d)(1) of the Act purported to preclude any stay by any court of a Commission or reorganization court employee protection order. Section 106(d)(2) of the Act established a truncated appeal procedure which expressly precluded subsequent review by the Supreme Court.

B. The Preliminary Injunction and Declaratory Judgment

On June 5, 1980, the Trustee, creditors and shareholders requested the Reorganization Court to enjoin the operation of the employee protection provisions of the Rock

Island Act. On June 9, 1980, after the submission of briefs and oral argument, Judge McGarr granted their request. He found an "exceedingly great" probability that the Act's imposition of a new $75,000,000 labor protection claim on the Rock Island estate to serve its purported public purposes, as well as its "truncated" procedural provisions, was an unconstitutional violation of the fifth amendment's prohibition against uncompensated governmental takings of private property for public purposes and the fifth amendment's due process clause. Transcript of Proceedings, June 9, 1980, at 81. (RLEA App. 11-18). Judge McGarr issued a preliminary injunction to maintain the status quo and to preserve the assets of the Rock Island estate pending full judicial review of the constitutionality of the Rock Island Act. (RLEA App. 19-20.) On June 11, 1980, the RLEA filed a Notice of Appeal in the United States Supreme Court pursuant to 28 U.S.C. § 1252.

On June 20, 1980, the Government and the Commission, joined by RLEA, sought to have Judge McGarr reconsider his injunction entered on June 9, 1980. Defendants' Motion to Reconsider Preliminary Injunction. After hearing oral arguments, Judge McGarr denied the motion to reconsider. Transcript of Proceedings, June 20, 1980, at 49-59. (RLEA App. 21-28.)

The next day, the RLEA filed its Application for Stay of the preliminary injunction with Justice Stevens of

the United States Supreme Court, the Circuit Justice for the Seventh Circuit.

On June 28, 1980, Justice Stevens denied the RLEA's motion for a stay of Judge McGarr's injunction pending appeal. Justice Stevens explained:

> [H]aving read the parties' submissions, I am now of the opinion that Judge McGarr was probably correct in concluding that the Act authorizes an unconstitutional taking of property of the estate. It appears to direct a transfer of $75 million off the top of the estate's assets to the employees. While such a transfer might be permissible in the course of a genuine reorganization, at least as of this moment, I have difficulty perceiving how, in the context of a liquidation, this is anything other than a simple taking of the property of the general creditors, as the trustee argues.

RLEA v. Gibbons, supra, 100 S. Ct. at 2671. The full Court sustained Justice Stevens' denial of the stay motion on July 2, 1980. RLEA v. Gibbons, supra, 100 S. Ct. at 3057. The RLEA's appeal remains pending in the United States Supreme Court.

C. The Staggers Rail Act of 1980

On September 29, 1980, in response to these judicial developments, Congress passed amendments to the original Rock Island Act as part of the Staggers Rail Act of 1980. The amendments reenact, without substantial alteration, the same scheme for the imposition of a new $75,000,000 labor

protection obligation on the Rock Island estate which was contained in the original Rock Island Act.*/

Section 701(b)(1) of the Staggers Rail Act reenacts Section 106 of the original Rock Island Act, which imposes the $75,000,000 cost of the Act's new labor protection scheme on the Rock Island estate. The period during which the Trustee and the labor unions are permitted to "negotiate" an agreement is halved. Failing a "voluntary" agreement, the time within which the Commission is required to "impose" a labor protection arrangement is also halved. The Staggers Rail Act eliminated Section 106(d)(1) of the original Act, which precluded any Commission or judicial stay of an order imposing labor protection under the Act, and the last sentence of Section 106(d)(2) of the original Act, which precluded review by the Supreme Court.

Section 701(a)(1) of the Staggers Rail Act also adds a new section on judicial review, Section 124, to the original Rock Island Act. Section 124 mandates that any

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*/ The amendments to the Rock Island Act were apparently enacted in response to election year exigencies. Fred Kroll, the chairman of RLEA and president of BRAC who called the strike against the Rock Island, publicly announced his endorsement of President Carter following the Administration's promise to seek passage of the bill. As reported by the September 25, 1980 edition of the Chicago Tribune (Tr. App. G-1):

> "Kroll also announced he was endorsing President Carter for re-election. The endorsement had been held up pending a promise from the administration to include labor protective provisions in the deregulation bill and help bail out the retirement board, Kroll said."

appeal from any decision of the reorganization court respecting the constitutionality of the Rock Island Act must be taken to this Court (notwithstanding the pendency of appeals of the June 9 injunction in the United States Supreme Court). Section 124(a) also appears to require that this Court must consolidate any appeals of subsequent Rock Island Act orders and the already pending appeals from the orders of the Milwaukee Railroad Reorganization Court respecting the constitutionality of the labor protection provisions of the Milwaukee Railroad Restructuring Act, 45 U.S.C. §§ 907, et seq. ("MRRA"). Section 124(a) also requires that these consolidated appeals must be heard by this Court sitting en banc, and that this Court must render its final decision within 60 days of the filing of the last appeal. Finally, Section 124(c) was added, which provides:

> Nothing in this Act or in the Milwaukee Railroad Restructuring Act (45 U.S.C. § 901 et. seq.) shall limit the right of any person to commence an action in the United States Court of Claims under section 1491 of title 28, United States Code (commonly referred to as the Tucker Act).

D. Motion to Vacate Preliminary Injunction

Based upon these amendments to the original Rock Island Act, on October 7, 1980, the Government, the Commission and the RLEA requested Judge McGarr to vacate his earlier order declaring the Act unconstitutional. On October 15, 1980, after the submission of briefs and oral argument,

Judge McGarr found that the amendments failed to cure the Act's constitutional infirmities and refused to vacate his earlier order. He ruled that the Act remained unconstitutional:

> This court has studied the Staggers Rail Act amendments to the Rock Island Act, has reviewed carefully the arguments of counsel, the documents filed by the various parties, the ruling of June 9, 1980, and the court's knowledge of these proceedings, and it remains clear that the Rock Island estate continues to be exposed to irreparable injury by the provisions of the Rock Island Act as amended by the Staggers Rail Act. The Staggers Rail Act does not cure the defects found in the Rock Island Act. Like its predecessor, the Staggers Rail Act imposes a $75,000,000 cost of administration claim on the Rock Island estate with priority over claims of general creditors and shareholders on the assets of the estate.
>
> Petitioner argues that the statutory scheme can be implemented, the money disbursed, and the validity of the program and extent of the Rock Island liability to finance it, later litigated. This, in fact, cannot be done without irreparable injury to the administration of the estate for the benefit of the creditors. The trustee is currently liquidating assets and preparing the plan for distribution to creditors. Under court order, the trustee is also preparing an interim plan for the immediate partial satisfaction of cost of administration claims. The imposition of a $75,000,000 uncertainty on the estate will totally halt the liquidation for the long period consumed by the appellate process, with irreparable injury to the already long-suffering creditors. Further, the whole liquidation plan will be distorted by the brooding omnipresence of a potential liability representing a significant percentage of the total assets.
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> Order of October 15, 1980, at 3-4 (RLEA App. 5, 8-9).

This appeal followed.

SUMMARY OF ARGUMENT

Judge McGarr, who is intimately acquainted with the history and condition of the Rock Island estate after supervising these proceedings for more than five years, properly found that the labor protection provisions of the Rock Island Act, as reenacted by the Staggers Rail Act, constitute a clear violation of the the fifth amendment to the United States Constitution; that the procedures prescribed by the amended Rock Island Act also violate the fifth amendment; and that Section 701 of the Staggers Rail Act exposes the estate of the Rock Island to irreparable harm in that the Rock Island estate would suffer an immediate loss of $75,000,000 through the Act's taking of its property for public use. The Trustee, creditors and shareholders further maintain that the Act violates the constitutional principles of separation of powers and equal protection, and the constitutional requirement that the laws on bankruptcy be uniform. Moreover, the addition of an oblique reference to the Tucker Act does nothing to cure these constitutional infirmities.

The amended Rock Island Act's scheme for the imposition of labor protection, including its curtailed procedural provisions and its extraordinary impositions upon this Court, the United States Supreme Court and the District Court in violation of the separation of powers provisions of

the United States Constitution, make it apparent that all of the factors which warranted Judge McGarr's initial injunction and Justice Stevens' and the Supreme Court's denial of a stay of that injunction now require that the injunction continue in effect and that Judge McGarr's order of October 15, 1980 be affirmed by this Court.

ARGUMENT

I.

THE ROCK ISLAND ACT'S EMPLOYEE PROTECTION PROVISIONS COMMIT A TAKING AND DEPRIVATION OF THE ROCK ISLAND ESTATE'S PROPERTY FOR A PURPORTED PUBLIC PURPOSE, IN VIOLATION OF THE FIFTH AMENDMENT.

Under the terms of Sections 106 and 110 of the Rock Island Act, as amended, a taking of the property of the Rock Island estate to fund the Rock Island Act's employee protection scheme must occur. If funded directly from the assets of the estate, a taking would occur immediately. If funded through an enforced federal loan under Section 110, the labor protection obligations created by the Act must still be accorded expense of administration status. The Act's scheme requires that these costs will be payable prior to the interests of the estate's shareholders and unsecured creditors, and may be payable prior to the amounts owed to secured creditors and trade creditors with cost of administration status. Without question, the Act's employee protection scheme would dilute the value of the estate's assets

and reduce the amount available to discharge its existing debts by an amount up to $75,000,000.*/

A. The Rock Island -- A Moribund Railroad Declared Cashless, Abandoned and Unreorganizable -- Has No Obligation To Use Its Funds In The Public Interest.

Congress has declared that protection of former Rock Island employees is essential to achieve the public purpose of continued rail operations, which it considers essential to the economies of the region served by the Rock Island. Rock Island Act, Section 102. However, Congress seeks to achieve its purpose by imposing an obligation on the Rock Island estate. In effect, Congress is seeking to support continued rail operations in the region formerly served by the Rock Island by imposing a $75,000,000 burden on the Rock Island estate. In so doing Congress has clearly violated the fifth amendment rights of the Rock Island estate, its creditors and shareholders.

Railroads may be required to continue operations at a loss for a reasonable period and to suffer diminution in their property values to serve legitimate governmental interests in maintaining the national transportation system. However, this permissible governmental interference with private interest is limited by the fifth amendment.

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*/ The $75,000,000 taking mandated by the Act represents approximately twenty-five percent of the estate's total liquidation value, by the Trustee's most recent estimates.

Regional Rail Reorganization Act Cases ("3R Act Cases"), 419 U.S. 102, 122 (1974).

In Brooks-Scanlon Co. v. Railroad Commission, 251 U.S. 396, 399 (1920), Justice Holmes stated the governing principle that:

> A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage . . . . If the plaintiff be taken to have granted to the public an interest in the use of the railroad it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss.

Accord, Bullock v. Railroad Commission, 254 U.S. 513 (1921); Railroad Commission v. Eastern Texas Railroad Co., 264 U.S. 79, 85 (1924); In re Penn Central Transportation Co., 384 F. Supp. 895, 918-19 (Special Ct. 1974); In re Penn Central Transportation Co., 382 F. Supp. 856, 868 (E.D. Pa. 1974). In In re Central Railroad Company of New Jersey, 485 F.2d 208, 213 (3d. Cir. 1973), cert. denied, 414 U.S. 1131 (1974), the court recognized "the basic principle that an owner of property retains the right ultimately to withdraw that property from a losing venture. Indeed, such a right appears to be a fundament of the taking provision."

Here, the Reorganization Court has determined that the Rock Island is constitutionally entitled to withdraw from the universe of industries subject to public regulation. As the district court found, reorganization of the Rock Island is no longer possible. The limited period during which Rock Island investors can be assumed to have

agreed to commit the estate's resources to the public's transportation needs is long past.

Very recently this Court held in connection with the embargo orders and related borrowings by the Milwaukee Road, that it is "settled that a railroad that is cashless cannot be required to continue operating to serve the public interest." In re Chicago, Milwaukee, St. P. & Pacific Railroad Co., 611 F.2d 662, 669 (7th Cir. 1979), rehearing denied (January 2, 1980) ("Milwaukee Embargo").*/ This Court recognized that the Milwaukee Road could not be compelled to continue to serve the public interest unless there was some realistic prospect of its reorganization and that, absent that prospect, its state of cashlessness would have permitted

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*/ In Milwaukee Embargo, supra, this Court explained that cashlessness of a railroad exists under the following conditions:

> (1) the trustee "after all reasonable efforts . . . was faced with an imminent depletion of cash that would make it impossible for him to pay current bills for wages, supplies, interline balances, and similar expenses, and still leave an amount sufficient to permit an orderly liquidation." Penn Central, 384 F. Supp. at 919, n.31;
>
> (2) the railroad is unable to obtain other funds without significantly threatening the interests of secured and unsecured creditors; and
>
> (3) there are insufficient funds made available by governmental bodies to allow the railroad to continue in existence. Valuation Proceedings, 439 F. Supp. at 1375-77 (7th Cir.)(1979).

611 F.2d at 669.

[Footnote continued on following page.]

the Milwaukee to discontinue all service notwithstanding the public interest. This Court cited Brooks-Scanlon, supra; Valuation Proceedings, 439 F. Supp. 1351-77 (Special Court 1977); and In re Penn Central Transportation Co., 384 F. Supp. 895, 918-19 and n.31 (Special Court 1974).

In contrast to the Milwaukee Road, the Rock Island is cashless, unreorganizable and formally abandoned. Clearly, under the Milwaukee Embargo and the Brooks-Scanlon principles, the Rock Island can have no continuing obligation to serve the public interest.

Relying on Interstate Commerce Commission v. Railway Labor Executives' Ass'n, 315 U.S. 373 (1942), and United States v. Lowden, 308 U.S. 225 (1939), the RLEA, the Milwaukee Trustee, and the United States have argued that the Rock Island labor protection program must be imposed on the Rock Island estate because it furthers national transportation policies which require that a stable railway labor force be available to serve the public's interest. What the Appellants and the Milwaukee Trustee fail to recognize when

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[Footnote continued from preceding page.]

On September 26, 1979, the Interstate Commerce Commission declared the Rock Island to be cashless and directed the Kansas City Terminal to take over the operations of the Rock Island pursuant to 49 U.S.C. 11125(a)(1). Directed Service Order No. 1398, 44 Fed.Reg. 56,343 (1979).

On that date (if not earlier) the Rock Island satisfied each of these conditions. The Commission had recognized that the railroad was without cash. There was no available alternative for funding, and the Government specifically refused to finance the Rock Island's operation. ICC Directed Service Order No. 1398, App. A, (Tr. App. C-45).

they apply the language of Lowden to the provisions of the Rock Island Act is that the public interest lies in a national transportation system, and that railway labor is only a component of that broader public interest.

The point missed by the Milwaukee Trustee, the United States and RLEA is that the constitutional right to withdraw from the railway business is measured against the public interest generally. The Brooks-Scanlon line of cases holds, and this Court has held, that where a railroad is cashless and not reorganizable, its right to cease operations is consistent with the public interest in all its aspects. It is axiomatic that if a private enterprise cannot be required to continue to devote its resources to further the overall national transportation policy because it is cashless and unreorganizable, it cannot be required to expend its funds to further a component of that policy.

B. New Obligations May Not Constitutionally Be Imposed On A Bankrupt Estate Where There Is No Possibility Of Reorganization.

The cases in which debts for continued operations have been imposed on bankrupt railroads have been limited to instances where there remained some hope of an income based reorganization. The theory of such exercises of governmental regulatory powers was described by the Supreme Court in the 3R Act Cases, where it stated that the general Brooks-Scanlon rule:

> is qualified by the requirement that a railroad estate suffer interim losses for a reasonable period pending good-faith efforts to develop a feasible reorganizaton plan if the public interest in continued rail service justifies the requirement.

419 U.S. at 122-123 (emphasis supplied) (citation omitted).

In Continental Bank v. Chicago, R. I. & P. R.R. Co., 294 U.S. 648 (1935), the Supreme Court upheld an injunction which deferred the right of secured creditors to sell collateral where the sale would have impaired the ability of the Court to achieve a successful reorganization under Section 77 of the Bankruptcy Act. This deferral was permissible to enable the successful reorganization of the railroad, only where the existing rights of all creditors would be benefitted by successful reorganization. 294 U.S. at 676-7. The reasoning of 3R Act Cases and Continental Bank is clear -- to require continued operations for a reasonable period to permit pursuit of an income-based reorganization discharges the legitimate governmental purpose in assuring continued rail operations. If successful, such continued operation may benefit the creditors of the estate through the resurrection of their capital investments. Here, after five years of efforts at such a reorganization, the Commission, the FRA and the Reorganization Court have agreed that the Rock Island is not reorganizable. Neither the Commission nor the Government has challenged this fundamental conclusion in these or in any other appeals.

In no case have additional priority debts or other clear impairments of property rights been imposed upon a bankrupt railroad's estate without some connection to an anticipated reorganization. Earlier in these reorganization proceedings Judge McGarr approved, and this Court upheld, a priority borrowing by the Trustee to support continued deficit operations of the Rock Island, even though that borrowing would for a time displace the interests of the estate's creditors, on the theory that the borrowing might preserve the ultimate possibility of a successful income-based reorganization, in which the creditors would receive full satisfaction of their claims. In re Chicago, R.I. & P. Ry. Co., 545 F.2d 1087 (7th Cir. 1976). Now that reorganization of the Rock Island is impossible, the imposition of any priority borrowing on this estate to fund the Rock Island Act's labor protection program is impermissible. The harm to the Rock Island creditors through the Rock Island Act's imposition of a new $75,000,000 expense of administration is certain and actual.

This Court reiterated the Brooks-Scanlon limitation on governmental regulation of railroad capital in its recent Milwaukee Embargo decision, supra, where it stated:

> To force a railroad to continue operations indefinitely at a loss in order that the public may be served is a violation of the Fifth Amendment rights of those who have a security interest in the enterprise. Brooks-Scanlon Co. v. Railroad Commission, 251 U.S. 396 (1920).

611 F.2d at 666. In its Milwaukee Embargo decision, this Court permitted the issuance of trustee's certificates to permit operations over a reduced portion of the Milwaukee Road pending the submission of a reorganization plan for income-based operations over a reduced core system. No one suggests that a reorganization of the Rock Island is possible.

If the purported public purpose stated in the Rock Island Act is to be served by the Act's provisions, the constitutional principle set forth in Brooks-Scanlon, supra, and its progeny require that the Rock Island estate can no longer be required to bear expenses to accomplish this public purpose.*/

C. If The Government Believes That The Public Interest Requires Protection To Former Rock Island Employees, Then The Government Must Pay For It.

It is unfortunate that the former employees of the Rock Island have lost their means of livelihood in the course of the estate's cessation of railroad operations. However, as in every other case, if the Act's purported public purpose of continued rail operatons is to be met through the continued support of former Rock Island employees,

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*/ Moreover, it seems clear that, if Congress legitimately considered the "public purpose" of the Rock Island Act scheme to be the provision of rail service over Rock Island lines, it could have done so more effectively by providing funds to the Trustee to continue operations as a rail entity when continued operations became impossible in September, 1979.

the cost of that support may not be charged to the bankrupt estate of their former employer, without governmental compensation which is "a full and perfect equivalent for the property taken." Monongahela Navigation Co. v. United States, 148 U.S. 312 326 (1893); United States v. Reynolds, 397 U.S. 14, 16 (1970).

Justice Holmes stated the general principle limiting governmental regulation which underlies the Brooks-Scanlon holding, in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-416 (1922):

> The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go -- and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle. . . . In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders . . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. (Citations omitted; emphasis supplied.)

D. The Milwaukee Road Is An Ongoing Rail Entity In Contrast To The Rock Island, Which Is Unreorganizable And In Liquidation.

Appellants and the Milwaukee Road Trustee rely on Judge McMillen's approval of the Milwaukee Trustee's

request to issue $75,000,000 in expense of administration certificates to fund the payment of labor claims under the Milwaukee Railroad Restructuring Act, 45 U.S.C. §§ 907, et seq. ("MRRA"), to support the imposition of labor protection obligations on the Rock Island. In re Chicago Milwaukee, St. P. & P. R.R. Co., No. 77 B 8999, Order No. 286 (N.D. Ill., February 7, 1980).*/

This reliance is misplaced because the situation of the Rock Island presents a stark contrast to the Milwaukee Road. The Milwaukee Road is progressing steadily toward reorganization. Recently, the Milwaukee Trustee consummated a sale of Milwaukee Land Company assets in the amount of $140,000,000. On October 17, 1980, the Milwaukee Reorganization Court found that the possibility of reorganization still exists for the Milwaukee Road. In re Chicago, Milwaukee, St. P. & P. R.R. Co., Order No. 406. The Milwaukee

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*/ As stated above, the level of employee protection benefits to be imposed on the Rock Island under the Rock Island Act is measured by the level of protection imposed by the MRRA. Congressional action in fixing Rock Island Act benefits at the exact sum specified for benefits for Milwaukee Road employees underscores the arbitrariness of the Rock Island Act scheme. The MRRA and the Rock Island Act both fix the ceiling for benefits that may be paid thereunder at $75,000,000. However, the asset base of the Milwaukee Road is twice as large as that of the Rock Island and the Milwaukee Road has employed approximately twice the number of employees as has the Rock Island. Moreover, the Milwaukee Road has had existing labor agreements with BRAC and other railway workers' unions, and therefore may have pre-existing contractual obligations to those employees, which the Rock Island does not.

Trustee in his brief in the MRRA labor protection appeal to this Court clearly anticipates successful reorganization of the Milwaukee Road. Judge McMillen, the Milwaukee Trustee, and the Congress which enacted the MRRA, all expect the Milwaukee Road to achieve reorganization as a viable enterprise. Thus, the Milwaukee Road estate may benefit from the implementation of the MRRA's labor protection program, because such a program may increase the likelihood of a successful reorganization.

In contrast to the Milwaukee Road situation, Judge McGarr, the Congress, and the Rock Island Trustee have acknowledged that no such hope remains for the Rock Island. This is precisely the distinction upon which the Supreme Court in the 3R Act Cases, supra, and this Court in its earlier Milwaukee Embargo and Rock Island opinions have relied in permitting the imposition of additional obligations in the past.

Judge McGarr noted the clear difference between the Milwaukee Road and the Rock Island situations in the initial hearing on the preliminary injunction of June 9, 1980:

> I'm not aware that it has ever been held that Congress can single out a private industry in bankruptcy and legislate for this single company only labor-mangement rights. I'm aware that in the Milwaukee Act something of that nature seems to have been done. I'm not sure that I agree with Judge McMillen and his conclusions, but neither do I disagree, because his situation is so different than the one before me that

> I don't find it analogous. The Milwaukee continues to operate, the Milwaukee has problems the Rock Island doesn't have, and the Milwaukee is in a situation the Rock Island is not in.

Transcript of Proceedings, June 9, 1980, at 77. Similarly, in his opinion denying the RLEA's request for a stay of the June 9 injunction, Justice Stevens noted "that the 'Milwaukee bill' concerned a genuine railroad reorganization, not a liquidation." RLEA v. Gibbons, supra, 100 S. Ct. at 2670, n.1.*/

The distinction drawn by Judge McGarr and Justice Stevens between the reorganizing Milwaukee Road and the liquidating Rock Island is central to the reasoning which has governed the imposition on railroads of burdens intended to serve the public interest. The teaching of the Brooks-Scanlon line of cases is that although the public interest may authorize governmental regulation to a reasonable degree, at some point, the public interest can no longer justify this governmental use of private property.

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*/ The Milwaukee Road's situation is distinguishable for additional reasons. The Milwaukee Trustee supports labor protection, participated in the drafting of the MRRA, voluntarily entered into a labor protection agreement under the MRRA with Judge McMillen's approval, and in so doing, settled acknowledged labor protection obligations.

E. The Rock Island Had No Existing Labor Protection Obligation. Therefore, The Rock Island Act Can Confer No Benefit On The Rock Island Estate.

The Government, the Commission and the RLEA argue that the Rock Island estate is benefited by the employee protection provisions of the Rock Island Act, on the theory that the Act merely quantifies existing labor protection obligations of the estate.*/

On June 2, 1980, Judge McGarr ruled that the Rock Island estate is constitutionally entitled to complete abandonment of all its lines and common carrier obligations, and that it has and constitutionally can have no labor protection obligations under existing law. This ruling was consistent with the unbroken series of Commission decisions refusing to impose labor protection obligations in total line abandonments. See Transcript of Proceedings, June 2, 1980, at 62-63.

In connection with his abandonment authorization of June 2, 1980, Judge McGarr considered the requirement of Section 17(a) of the Milwaukee Railroad Restructuring Act:

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*/ Section 108 of the Act provides that employees receiving assistance under the Act "shall be deemed to waive any employee protection benefits otherwise available to such employee under the Bankruptcy Act, Title 11 of the United States Code, subtitle IV of Title 49 of the United States Code, or any applicable contract or agreement. . . ." It is clear that no benefit will devolve to the estate through this election provision, since the Reorganization Court has already determined that the estate has no remaining obligations under these statutes.

> [I]n authorizing any abandonment pursuant to this section, the court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under Section 11347 of title 49 of the United States Code.*/

This statute gives reorganization courts power to deal with labor protection in abandonments -- a power formerly granted to the I.C.C. In enacting Section 17(a), Congress intended "no change in existing law as it affects employee protection." H.R. Conference Rep. No. 96-583, 96th Cong., 1st Sess. 27 (1979). Thus, Section 17(a) mandates that a reorganization court impose labor protection at the level which would have been imposed by the Commission prior to the enactment of Section 17(a).

Prior to the enactment of Section 17(a), Commission approval of abandonments of railroad lines was governed by 49 U.S.C. § 10903, which like Section 17(a) incorporates

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*/ The legislative history of Section 17(a) indicates that "no change in existing law as it affects employee protection" is intended thereby. H.R. Conf. Rep. No. 96-583, 96th Cong., 1st Sess. 27 (1979). Thus, Section 17(a) mandates that the court impose labor protection in accordance with that which would be imposed by the ICC pursuant to 49 U.S.C. § 11347.

Section 11347 provides that the ICC shall require a "carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by a [consolidation, merger or acquistion] as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45." 49 U.S.C. § 11347. Section 11347 is the recodification of Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(f). By its terms Section 11347 applies only to labor protection to be accorded in consolidation, mergers and acquisitions.

Section 11347 by reference. When Congress enacted 49 U.S.C. § 10903, it was specifically recognized that total termination of service and system-wide abandonment situations such as the Rock Island's are unique situations and subject to their own set of rules. The legislative history of Section 10903 makes the point plainly, referring to:

> [E]mployee protection no less beneficial than that established under Section 5(2)(f) of the Interstate Commerce Act and Section 405 of the Rail Passenger Service Act but without intention to change the policy and practice of the Commission in connection with certificates involving total termination of service by a railroad company. (Emphasis supplied.)

S. Conf. Rep. No. 94-595, 94th Cong., 1st Sess. 218 (1976).

The Commission has consistently declined to impose labor protective conditions in situations involving the abandonment of a railroad's entire line.*/ See, e.g., East Carolina Railway Co. Abandonment, 324 I.C.C. 506 (1964). In Okmulgee Northern Railway Abandonment, 320 I.C.C. 637, 645 (1964), the Commission stated:

> [T]he imposition of protective conditions in proceedings such as these, where a carrier proposes to abandon its entire line

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*/ Montpelier & Barre Railroad Co. Abandonment (Dkt. No. AB-202 F) ____ I.C.C. ____ (1980); Northampton & Bath Railroad Co. Abandonment, 354 I.C.C. 784, 785-86 (1978); Wellsville, Addison & Galeton Railroad Corp. Abandonment, 354 I.C.C. 744, 746 (1978); Tennessee Central Railway Co. Abandonment, 333 I.C.C. 443, 453-54 (1968); Okmulgee Northern Railway Co. Abandonment, 320 I.C.C. 637, 645-46 (1964); Rutland Railway Corp. Abandonment, 317 I.C.C. 393 (1962), aff'd sub nom. Brotherhood of Locomotive Engineers v. United States, 217 F. Supp. 98 (N.D. Ohio 1963); Chicago, Attica & Southern Railroad Co. Abandonment, 261 I.C.C. 646 (1946).

> of railroad normally is not warranted, and would not serve, in most instances, to strengthen the transportation system within the contemplation of the national transportation policy. A departure from this principle in particular cases must be supported by clear and convincing evidence.

The ground for such rulings is clear: the public interest in continued rail operations simply is not served by the payment of labor protection to employees no longer needed because the public interest mandates that the total rail systems on which they were employed be abandoned.

In the recent case of Wellsville, Addison & Galeton Railroad Corp. Abandonment, 354 I.C.C. 744, 746 (1978), the Commission stated:

> Prior Commission precedent in this area is well established. Employee protective conditions have not been imposed in cases involving complete abandonment of operations, because the Commission found it unwarranted to require further consumption of a railroad's properties for the payment of employees after the railroad ceases operations. Okmulgee Northern Ry. Co. Abandonment, 320 I.C.C. 637 (1964). Tennessee Central Ry. Co. Abandonment, 333 I.C.C. 443, 454 (1968). [Applicant] has no corporate parent that would benefit from the abandonment of the railroad. . . . The prior decision will be modified to remove all references to employee protection, specifically those conditions for protection of employees as set forth in Oregon Short Line R. Co. -- Abandonment -- Goshen, 354 I.C.C. 76 (1977).

Thus, the Commission has recognized that where no benefit accrues to a surviving railroad entity through the termination of service on unnecessary lines, it would be unfair to impose labor protection conditions on the abandonment.

The Rock Island situation is singularly parallel to that of the Tennessee Central Railway. Like the Rock Island, the Tennessee Central had suffered years of consecutive losses and had consumed its stockholders' equity to offset those operating losses. The Tennessee Central had no hope of survival as a going concern. Given this history, the Commission concluded that "it was neither equitable nor warranted. . .to require further consumption of the railroad properties for the payment of employees after the railroad ceases operation." 333 I.C.C. at 454. In Tennessee Central, the Commission stated:

> The applicant is a bankrupt business entity unable to meet either its long-term or immediate financial obligations. Despite its straitened financial circumstances through the years, TC has provided regular employment for its work force and has paid its employees in full satisfaction of the terms of their collective bargaining agreements. On the other hand, it has for many years been unable to provide a return of any kind to its stockholders and has fallen substantially short of meeting its legal obligations to others upon whom it has drawn for supplies, materials and equipment needed to sustain its operation. To the extent it is delinquent on car rentals, per diem and interline traffic accounts, its operation is being sustained in part by other railroads and equipment-leasing companies. To the extent it has paid the payroll and other current operating expenses while neglecting other obligations due, the railroad and its employees have been sustained by the creditors. Over the past 5 profitless years, the aggregate deficit has come to nearly $5 million, the stockholder's equity has been consumed in maintaining operations, assets are being further eroded, and the TC has reached the point where it cannot hope, as a going concern, to pay off its creditors. In such a situation, <u>we find it neither equitable nor</u>

> warranted on any ground, to require continued operation for the purpose of providing jobs for the carrier's employees or to require further consumption of the railroad properties for the payment of employees after the railroad ceases operation. In reaching this conclusion we are mindful of the fact that certain unemployment compensation is otherwise available to employees. Unlike the circumstances in Washington and Old Dominion R. Abandonment - Virginia, 331 I.C.C. 587, or East Carolina Ry. Abandonment, 324 I.C.C. 506, TC is not affiliated with a large, financially strong corporation benefiting from the abandonment and capable of sharing some of the costs incident to an abandonment. The facts of this case do not warrant the imposition of labor protective conditions, and they will not be imposed.

333 I.C.C. at 453-54. (Emphasis supplied.)*/

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*/ The Commission has imposed labor protection conditions on entire line abandonments in only two narrowly defined circumstances which are inapposite to the Rock Island situation: (1) where the corporate parent of the abandoning rail carrier is itself a rail carrier which intends to assume all or some portion of the subsidiary's operations but be relieved of its deficit operation, and (2) where the corporate parent, whether or not a carrier, obtained financial benefits from the disposition of the abandoned properties far in excess of the sum of the parent's net investment in the subsidiary and the aggregate of the operational deficits incurred by the subsidiary in the years following the parent's acquisition of the subsidiary's stock. See, e.g., Wolfeboro Railroad Co. Entire Line Abandonment, I.C.C. Docket No. 208F slip op. at 2-3 (October 3, 1979.) Washington & Old Dominion Railway Abandonment, 331 I.C.C. 587 (1968). Savannah Union Station Company Abandonment, embraced in Seaboard Air Line Railroad Co. Trackage Rights, 312 I.C.C. 797 (1962). Northampton & Bath Railroad Co. Abandonment, 354 I.C.C. 784 (1978).

Clearly, neither of these circumstances is present in the Rock Island's case. No corporate parent will survive to obtain the benefits of the abandonment or create a fund from which such benefits may be drawn. The authorization of abandonment for the Rock Island was not a windfall from which additional profits could be expected. Rather, it was merely a recognition of the estate's constitutionally required right to withdraw its assets from a losing operation.

The Commission reaffirmed its general policy to decline to impose labor protection conditions on total line abandonments in its advisory report to the Reorganization Court on May 27, 1980 (Tr. App. E-16-17). This long line of Commission precedents and the constitutional principles of Brooks-Scanlon, supra, underlie the Reorganization Court's finding of June 2, 1980, that to require the payment of further labor protection obligations in connection with the abandonment of Rock Island lines would be constitutionally impermissible and equitably unwarranted.

As the Reorganization Court recognized in its ruling of June 9, 1980, no benefit to the estate can be implied from those provisions of the Act that purport to substitute a new form of labor protection for any existing labor protection, because no further labor protection obligations may constitutionally be imposed on this estate, whether their purpose be to further the national transportation policy or not. Thus, the Rock Island Act cannot be said to have "quantified" an existing obligation of the Rock Island estate. Rather the Rock Island Act employee protection obligations are wholly new obligations imposed retroactively on the bankrupt estate, to the inevitable detriment of the estate and its creditors and shareholders.

F. The New Obligation Imposed By The Rock Island Act Is Not Legitimate Governmental Regulation.

The Milwaukee Trustee, the RLEA and the Government argue that the Rock Island Act is valid economic regulation

of employer-employee relations. The Milwaukee Trustee cites cases which have upheld statutes of general applicability which imposed standards or conditions for future economic relationships or effectuated existing obligations. However, the Milwaukee Trustee and the Government have pointed to no case upholding legislation which, like the Rock Island Act, creates a new burden unrelated to existing obligations or benefits.

For example, the Milwaukee Trustee depends on Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976), in which the Court upheld the Black Lung Benefits Act of 1972, which obligated mining operators to compensate past, as well as present, employees afflicted with black lung disease. However, the Black Lung Act only "allocated" the existing interlocking rights and duties of employers and employees, but did not create wholly new obligations. 428 U.S. at 15. Moreover, the Court specifically noted that "a substantial portion of the burden for disabilities stemming from the period prior to enactment is borne by the Federal Government." 428 U.S. at 18.*/

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*/ The Turner-Elkhorn Court indicated that the Black Lung Act was different from other economic legislation, which might not be so favorably viewed by the courts:

> The point of the black lung benefit provisions is not simply to increase or supplement a former employee's salary to meet his generalized need for funds. Rather, the purpose of the Act is to satisfy a specific need created by the dangerous conditions under which the former employee labored -- to allocate to the mine operator an actual, measurable cost of his business.

428 U.S. at 19.

In United States v. Lowden, supra, relied on by the Milwaukee Trustee and RLEA, the Supreme Court upheld regulations which provided that the Commission could condition its approval of railroad consolidations upon the provision of labor protection to adversely affected employees. Like the regulation in I.C.C. v. Railway Labor Executives' Association, 315 U.S. 373 (1942), and the cases cited by the Milwaukee Trustee (Milwaukee Trustee's Brief at 22), the Lowden regulation was to apply prospectively, rather than to create new obligations governing employment relations that had already ended.*/

The Supreme Court has at least twice invalidated legislation which, like the Rock Island Act, attempted to impose "retroactive" economic burdens. In Railroad Retirement Board v. Alton Railroad Co., 295 U.S. 330 (1935), the Supreme Court invalidated as a violation of the due process clause the Railroad Retirement Act of 1935, which attempted to impose a compulsory retirement and pension system upon all interstate carriers by rail. The Act required employers to pay the cost of retirement pensions for all workers presently employed as well as for workers whose employment had terminated in the year prior to enactment.

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*/ Moreover, the Lowden railway labor protective conditions were to be undertaken voluntarily. The railroad could choose to accept the conditions or forego the consolidation.

Whatever the legislative purpose, the Court found it arbitrary to impose "liability to pay again for services long since rendered and fully compensated." 295 U.S. at 354. The Court held:

> The provision is not only retroactive in that it resurrects for new burdens transactions long since past and closed; but as to some of the railroad companies it constitutes a naked appropriation of private property upon the basis of transactions with which the owners of the property were never connected. Thus the Act denies due process of law by taking the property of one and bestowing it upon another. This onerous financial burden cannot be justified upon the plea that it is in the interest of economy, or will promote efficiency or safety.

295 U.S. at 349-50.*/

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*/ The impermissibility of the requirement that the private resources of the Rock Island estate be committed to a public purpose is especially clear where, as in the Rock Island's case, the public interest purportedly to be served bears no logical relation to the original commitment of resources to an industry subject to public regulation. Here, the purported public interest of a Rock Island employee protection plan is to assure the continuation of rail services over Rock Island lines. However, the employees who would benefit by the Rock Island Act scheme are those not hired by other carriers operating over Rock Island lines. Because the United States has continued to fund directed service operations over those lines considered crucial to the national transportation system, and other carriers and non-carrier entities have continued operations over those lines whose operation offered economic advantage, and former Rock Island employees were given preference for employment in service over Rock Island lines, those employees not hired are those who are simply not needed for the operation of the nation's transportation system. Thus, the public interest served is not that of temporary support for employees valuable to the national rail system.

[Footnote continued on following page.]

Similarly, in Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978), the Supreme Court invalidated under the contract clause a 1974 Minnesota act, under which a narrow class of private employers could be subjected to a special "pension funding charge," providing greater coverage to employees than they were entitled to under existing pension plans. Finding the Minnesota legislation arbitrary and irrational, the Court pointed out that the legislation imposed "a sudden, totally unanticipated, and substantial retroactive obligation upon the company to its employees." 438 U.S. at 249.*/

[Footnote continued from preceding page.]

The employees affected are those whose rail employment is simply not justified in economic terms.

Rather than directly serving the national interest by preserving an important skilled work force, the only "public benefit" which could be gained from the Act's employee protection system is the prevention of rail strikes by employees not affected by the cessation of operations over Rock Island lines, in sympathy with those former Rock Island employees no longer needed to operate abandoned rail lines. See p. 18, footnote, infra.

It would be the height of irony that the Rock Island estate could be compelled to suffer the loss of over one-quarter of its value to prevent labor strife when it was precisely a strike improvidently called by BRAC that caused the Rock Island's demise.

*/ Moreover, the Spannaus Court noted that the law did not deal with a general social problem, but benefitted only a single "favored" group. 438 U.S. at 242, 250. The Rock Island Act, being solely designed to impose a burden on the Rock Island for the benefit of its former employees is even narrower legislation than that invalidated in Spannaus.

In all of the cases relied on by the Milwaukee Road Trustee, including the cases of the Chrysler Corporation and the Milwaukee Road, where Congress chose to meet a threatened unemployment crisis, it did so by providing substantial federal assistance to ensure the survival of the employer as an economic entity.*/

Moreover, since Congress has chosen to confer administrative expense status on the Act's labor protection obligation, the clear effect of this classification is to work an unconstitutional taking of creditor's rights in the property of the Rock Island.**/ A case directly on point is Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935).

In Radford, the Court considered certain sections of the Frazier-Lemke Act which allowed mortgagors who failed to obtain consents requisite to a composition under Section 75 of the Bankruptcy Act, to acquire, upon adjudication of

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*/ Obvious examples of this disparate treatment appear in the Staggers Rail Act of 1980. Section 701(c)(1) of the Staggers Rail Act amended the MRRA, 45 U.S.C. § 906(h)(1), to forgive $55,000,000 in priority loans to the Milwaukee Road. Section 504 of the Staggers Rail Act amends Section 509 of the 3R Act, 45 U.S.C. § 779, to add $135,000,000 to the $500,000,000 fund already provided for assistance to former employees of Conrail.

**/ In particular, the Act violates the constitutional rights of the First Mortgage Bondholders whose security, pursuant to an Indenture of Mortgage dated as of January 1, 1950, is comprised of the entire Rock Island system. However, insofar as the Rock Island Act also displaces the interest of administrative claimants, unsecured creditors and shareholders, it also offends their fifth amendment rights under Radford.

bankruptcy, alternative options with respect to the mortgaged property, thus retroactively affecting the rights of the mortgagee in specific property held as security.

It was argued that the challenged statute's changes in the mortgagees' property rights were permissible due to the grave emergency which then confronted the nation's farmers by the prospect of widespread foreclosure of farm mortgages and the resultant transformation of farmer-owners into tenants or farm laborers. It was argued that the Frazier-Lemke Act was an appropriate remedy to this threatened calamity. 295 U.S. at 598-599. Despite judicial notice of these compelling economic considerations against the backdrop of the Great Depression, the Radford court concluded that the Frazier-Lemke Act as applied unconstitutionally deprived mortgagees of their rights in specific property. Justice Brandeis declared:

> [T]he Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public.

295 U.S. at 602 (emphasis supplied).

Thus, whatever the public policy motivations for the Rock Island Act, its imposition on the Rock Island estate of a new administrative expense, which confers no benefit upon the estate directly affronts the Radford principle.

II.

THE POSSIBILITY OF A LATER TUCKER ACT REMEDY CANNOT JUSTIFY OTHERWISE UNCONSTITUTIONAL GOVERNMENTAL ACTS

Appellants' motions to vacate Judge McGarr's June 9 injunction and their briefs to this Court are premised on the superficial changes in procedure contained in the Staggers Rail Act amendments to the Rock Island Act. If this Court agrees to consider this case at all, it should address only the issue raised in the motions to vacate the June 9 injunction. This Court should consider only the conclusion of Judge McGarr on October 15, 1980, that the changes made by the Staggers Rail Act are only cosmetic and do not remedy the basic constitutional infirmities of the Rock Island Act.

Appellants rely primarily on the amendment to Section 124(a) of the Rock Island Act,*/ which states that the statute does not limit any right of the Rock Island estate to bring a subsequent suit under Section 1491 of Title 28 of the United States Code (the "Tucker Act"), should the labor protection provisions of the Act prove to be unconstitutional. The Tucker Act permits the Court of

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*/ The exact language of Section 701(a)(1) of the Staggers Rail Act of 1980 as it amends Section 124(c) of the Rock Island Act is:

> Nothing in this Act or in the Milwaukee Railroad Restructuring Act (45 U.S.C. 901, et seq.) shall limit the right of any person to commence an action in the Court of Claims under section 1491 of title 28, United States Code (commonly referred to as the Tucker Act).

Claims to entertain claims against the United States which are:

> [F]ounded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Congress and Appellants have mistakenly assumed that a mere oblique reference to the Tucker Act is sufficient to authorize the prior commission of an otherwise unconstitutional act.

Appellants' misapprehension as to the effect of a provision which does not bar a later uncertain remedy for the taking of the estate's property flies in the face of the most basic due process principles of our Constitution. It is founded on the proposition that a likely violation of fifth amendment property and due process rights may be authorized if a later possibility of redress remains.

The United States Supreme Court has found inherently unacceptable propositions such as that advanced by Appellants in discussions concerning basic due process rights. For example, in Fuentes v. Shevin, 407 U.S. 67 (1972), the Court set forth the procedural due process requirement of notice and opportunity for a hearing prior to the seizure of property. The Court's reasoning discredited

the very proposition relied on by Appellants in support of their motions to vacate and their requests for a stay:

> If the right to notice and hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.' Stanley v. Illinois, 405 U.S. 645, 647 [1972].

407 U.S. at 81-82. (Emphasis supplied.) The principle applied is clear: a violation of constitutional rights, even if only temporary, is in itself irreparable injury. The procedure suggested by Appellants is thus truly extraordinary, and is fundamentally inconsistent with the central principles of protection of due process rights.

A. The Tucker Act Is Merely A Jurisdictional Grant And Confers No Substantive Rights.

In the recent case of United States v. Testan, 424 U.S. 392, 398 (1976), the Supreme Court noted that "[t]he Tucker Act . . . is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages." (Emphasis supplied.)

The distinctions between the usual Tucker Act cases described by the Testan court, supra, and the case at

bar are fundamental. First, a Tucker Act remedy requires a clear acknowledgment of federal liability, see, e.g., Testan, supra, 424 U.S. at 400-401; Whiskers v. United States, 600 F.2d 1332 (10th Cir. 1979), cert. denied, 100 S. Ct. 1028 (1979). The Rock Island Act contains no such acknowledgment, nor any assurance that the Government will pay the $75,000,000 cost of the Act's labor protection scheme if compensation is later found to be owed. Secondly, the Tucker Act is intended to remedy only certain governmental wrongs which have already occurred. The Tucker Act provision in the Rock Island Act amendments, however, is sought to be used as a device to warrant future takings of private property.

B. The Availability And Adequacy Of The Tucker Act Remedy In The 3R Act Cases Does Not Justify The Rock Island Act's Taking, Where Congress Has Refused To Acknowledge Any Liability, And Where The Taking Has Been Found To Be Unconstitutional.

The misapprehension of Congress and the Appellants that the Rock Island Act's constitutional defects are cured by its oblique reference to the Tucker Act apparently rests on the Supreme Court's opinion in the 3R Act Cases. See Conference Committee Report, supra, 96 Cong. Rec. H 9931 (daily ed. Sept. 29, 1980). This misapprehension can be derived only from a superficial reading of the 3R Act Cases opinion.

The 3R Act Cases adjudicated the constitutionality of the Regional Rail Reorganization Act of 1973, 45 U.S.C. 701, et seq. (the "3R Act"). The 3R Act established a new entity, known as Conrail, to own and operate the bankrupt railroads of the Northeast.*/ The Act required the private owners of the bankrupt railroads immediately to convey their property interests to Conrail, taking in exchange Conrail securities and federally guaranteed United States Railway Association ("USRA") obligations funded by an immediate grant of $500,000,000. In addition to this grant, one billion dollars was appropriated to fund the rehabilitation and reorganization of the new rail entity. The new entity was thus initially funded with all the assets of the former private railroads, as well as federal funds in the amount of $1.5 billion.

The creditors of the railroads whose assets were to be conveyed challenged the conveyance scheme as a taking of their property in violation of their fifth amendment rights. They argued that: (1) the package of Conrail securities and USRA obligations initially funded by a Federal grant of $1.5 billion which they received in exchange for

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*/ These included the recently merged New York Central and Pennsylvania Central Railroads (Penn Central). Other private railroads included in Conrail were the Reading, Erie Lackawann, Central of New Jersey, Lehigh Valley, Boston and Maine, Ann Arbor and the Lehigh and Hudson River. For the sake of convenience, all the railroad entities merged into Conrail will be referred to in this brief as Penn Central.

their rail properties would not constitute the constitutionally required equivalent of the property conveyed -- that is, that the amount immediately appropriated as compensation for the property taken was inadequate (the "conveyance taking" issue), and (2) the continuation of rail operations pending implementation of the plan mandated by the 3R Act would result in an additional unconstitutional taking of their property through erosion beyond the constitutional limits established in Brooks-Scanlon, supra, and other cases (the "erosion taking" issue). 419 U.S. at 118.

The 3R Act did not specifically address the question whether a Tucker Act remedy would be available to the rail property owners should the compensation provided in the Act prove inadequate. The Court thus defined the major issues before it: (1) whether an action at law under the Tucker Act would be available to assure recovery for any deficiency of constitutional dimension in the compensation provided for the takings effected by the Act, and (2) if the Tucker Act remedy was available, whether it would result in adequate compensation to the rail owners. 419 U.S. at 121.

The Supreme Court held that the possibility of a later Tucker Act remedy was not withdrawn by the Act. In addition, it held that the possibility of that remedy, if it later became necessary, could adequately compensate the Penn Central owners for any "constitutional shortfall" resulting from the conveyances required, or the possible erosion of

the estate prior to conveyance. On these grounds, the Court found that the 3R Act did not work an unconstitutional taking.

The Court in 3R Act Cases pointed out that Congress clearly indicated its intent to consider the 3R Act's fairness to the Penn Central's owners and to compensate them fully both by immediately appropriating funds to back up the new securities to be exchanged for the rail properties and by authorizing the statutorily established Special Court to adjudicate and correct any defects in the plan. Congress appropriated a total of $1.5 billion in the 3R Act to assure compensation, with the Tucker Act remedy available should any shortfall occur. By contrast, Congress has declined to appropriate a penny to cover the cost of the Rock Island Act employee protection scheme. In the 3R Act conveyance to Conrail, Congress conceded the liability of the United States in the statutory scheme. In the case of the Rock Island, Congress steadfastly refuses to concede any possible liability. Thus, the question presented in the 3R Act Cases was not whether there would be any compensation by the Government, but whether the amount of compensation made available would ultimately be adequate.

Moreover, the 3R Act Cases Court made it plain that the validity of the 3R Act plan rested on its provision for full and adequate compensation to creditors. The Court stated:

> Congress has not formulated an unconstitutional reorganization plan in compelling a reorganization wherein the compensation to appellees consists of Conrail and USRA securities and other benefits 'so long as the creditor gets all the value of his lien and his share of any free assets.' RFC v. Denver & R.G.W.R. Co. [328 U.S. 495, at 533].

419 U.S. at 154-55.

The Court's determination of the plan's constitutionality also rested on the necessity of the plan to accomplish the goal of reorganizing the railroads of the Northeast. The Court commented concerning the potential "troublesome problem of procedural due process," raised by the required conveyance of property before its valuation:

> [T]he procedural sequence is vital to accomplishing the goals of the Act. If judicial review of the terms of the transfer was required before the conveyance could occur, the conveyance might well come too late to resolve the rail transportation crisis. As long as creditors are assured fair value, with interest, for their properties, the Constitution requires nothing more.

419 U.S. at 156.

Thus, the 3R Act was basically a condemnation statute: the Government took specific rail properties needed to form the new government-owned rail corporation (Conrail). Congress appropriated sums which it believed to be sufficient to compensate the former owners for their property, and the Tucker Act remedy was available to cover a shortfall -- if a shortfall should occur.

In stark contrast is the conveyance of $75,000,000 of the Rock Island's property in cash. The Rock Island Act's taking of funds, the value of which is immediately known, is thus sharply different from the conveyance of specific rail properties of unknown value to establish the Conrail entity. Here, Congress is not taking unique rail property for public use. Rather, it is requiring the expenditure of the Rock Island's private funds to achieve a perceived public purpose, which Congress could, if it chose to do so, fund directly.*/

C. The Amended Rock Island Act's Oblique Reference To The Tucker Act Indicates No Congressional Intent To Bear The Cost Of The Act's Employee Protection Program.

The 3R Act Cases Court repeatedly explained the Congressional failure to mention the availability of a Tucker Act remedy in the Conrail scheme as follows:

> Congress was so convinced that the huge sums provided would surely equal or exceed the required constitutional minimum that it never focused upon the possible need for a suit in the Court of Claims.

419 U.S. at 128. This inference affirmed the reading of legislative history and Congressional intent in the decision

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*/ Congress initially funded the similar labor protection provisions of the 3R Act with $250,000,000 given in the form of a federal grant to the new rail entity. 45 U.S.C. 775, 779. The Staggers Rail Act of 1980, Title V, Section 504, 96 Cong. Rec. H 9910 (daily ed., Sept. 29, 1980), adds $235,000,000 to this employee protection fund. This grant for funding of the similar Conrail labor protection program is particularly ironic in light of the fact that the 3R Act's labor protection grants were given to an operating railroad. See 3R Act Cases, supra, 419 U.S. at 144.

of Judge Friendly, from which the appeal was taken, In re Penn Central Transportation Company, 384 F. Supp. 895, 941 et seq. (Special Court, 1974). Thus, in the 3R Act Cases, supra, both the Congress and the Supreme Court acknowledged that compensation was owed to the Penn Central for the taking of its property.

The Court's reliance on the clear Congressional acknowledgment of liability and its initial appropriation of "huge sums" to support its finding of constitutionality highlight the fact that the Tucker Act remedy found adequate in the 3R Act Cases was to be considered only as assurance of adequate compensation should the sums appropriated prove inadequate. Thus, in the circumstances of the 3R Act case, it was reasonable for the Court to conclude that, if the package of Conrail securities, USRA obligations and "other benefits" was inadequate to compensate the railroads for the forced conveyance, a later Tucker Act remedy would assure adequate compensation.

In its June 9, 1980 grant of a preliminary injunction, the Rock Island Reorganization Court recognized the clearly disclosed Congressional intention not to compensate the Rock Island estate for sums expended under the original Rock Island Act. This reading was confirmed and accepted by Justice Stevens, who relied on the legislative history as well as the language of the Act in his opinion denying the RLEA's Motion for a Stay. Justice Stevens pointed out the

remarks of Congressman Madigan concerning the employee protection program, at 96 Cong. Rec. H 2329 (Mar. 28, 1980):

> 'There is a $75 million guaranteed obligation in this bill for labor protection payments to the Rock Island employees whose jobs are terminated. That is not an appropriation of Federal funds that will not be returned; it is a priority claim against the estate of the Rock Island Railroad, and it is structured exactly the same as the Milwaukee bill which we passed late this year.'
>
> 'At the risk of being redundant, I would like to repeat, the $750 million for the Northeast corridor is in the President's budget. The money for the Rock Island Railroad will be paid back from the estate of the Rock Island Railroad.' (Emphasis added.)

Justice Stevens explained:

> Congress rather clearly indicated its intent that the Government ultimately not to be required [sic] to underwrite any of the employee protection payments, but rather to have them imposed entirely as a burden on the Rock Island estate.

RLEA v. Gibbons, supra, 100 S. Ct. 2670, at n. 1.

Neither the Rock Island Act amendments nor their legislative history disclose any Congressional intention to repudiate this initial denial of federal compensation for the cost of the program.

The only legislative comment concerning funding of Rock Island employee protection in the Staggers Rail Act appears in the Conference Committee's Joint Explanatory Statement:

> Benefits and allowances under this arrangement shall be paid by the Rock Island Railroad and shall be treated as administrative expenses of the estate of the Rock Island Railroad. By specifically stating that there is a Tucker Act remedy, the benefits and allowances will immediately become available to the qualifying Rock Island employees and the Trustee may pursue his allegations of unconstitutional action under the Tucker Act.

96 Cong.Rec. H. 9931 (daily ed. Sept. 29, 1980).

This language indicates no Congressional admission of liability for the employee protection scheme established under the Act. Rather, it indicates once again Congressional intent to go forward with the scheme, and to deny full and immediate compensation to the Rock Island regardless of the clear unconstitutionality of the Rock Island Act.

III.

THE ROCK ISLAND ACT VIOLATES THE CONSTITUTIONAL PRINCIPLES OF DUE PROCESS, SEPARATION OF POWERS AND EQUAL PROTECTION IN SEVERAL MAJOR RESPECTS.

A. The Rock Island Act Violates The Separation Of Powers Doctrine By Directing The Reorganization Court To Impose Any Labor Protection Arrangement Ordered By The Commission On The Estate, Regardless Of The Unconstitutionality Of The Imposition.

The separation of powers doctrine dictates that Congress cannot use its general power to allocate judicial responsibility to prescribe a rule of decision in a pending case. Congress may not extend a particular jurisdictional grant and at the same time direct the courts as to the content of their decision-making process. United States v.

Klein, 80 U.S. (13 Wall.) 128 (1871). Moreover, Congress cannot selectively single out a court and retract that court's jurisdiction. See, e.g., Glidden Co. v. Zdanok, 370 U.S. 530, 568 (1962).*/

Under Section 77 of the Bankruptcy Act, 11 U.S.C. § 205(a), the district court administering the reorganization of a railroad has exclusive jurisdiction over the bankrupt railroad's property. New Haven Inclusion Cases, 399 U.S. 392, 420-21 (1970). Section 77(a) specifically provides that the reorganization court has "exclusive jurisdiction of the debtor and its property wherever located . . . ."**/

Section 106(c) of the Rock Island Act directs the reorganization court to "immediately authorize and direct the Rock Island Railroad Trustee to . . . immediately implement an arrangement [imposed by the Commission]." This grant of authority to the Commission, an agency by definition expert only in railroad operations, to direct the impositions

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*/ This basic principle, which precludes Congressional interference in pending proceedings, was applied in a pending bankruptcy proceeding in 1881. Kilbourn v. Thompson, 103 U.S. 168 (1880).

**/ Under Section 77(a), the Reorganization Court has exclusive jurisdiction over its trustee. Under Section 77(b) of the Bankruptcy Act and under Section 1171(b) of the new Bankruptcy Code, the Reorganization Court has exclusive jurisdiction to adjudicate the validity of claims and to "determine the precise contours of the priority" of existing claims against the Estate. House Report No. 95-595, 95th Cong., 1st Sess. (1977) 424. Section 77(c)(3) of the Bankruptcy Act leaves for the Reorganization Court such jurisdiction over borrowings and the issuance of trustee certificates "as might in an equity receivership be lawful."

of a debt on a bankrupt entity no longer involved in rail operation, is extraordinary indeed. It thus clearly invades the exclusive jurisdiction of the Reorganization Court over the priority of claims and assets of the bankrupt estate.

B. The Rock Island Act Unconstitutionally Singles Out the Rock Island.

The unconstitutionality of the Rock Island Act labor protection scheme as a taking and deprivation of property is accentuated by the fact that the Act singles out only one company upon which to impose its new obligations.

1. The Rock Island Act Is Special Legislation, Which Violates Due Process And Equal Protection By Discriminating Against One Railroad In Reorganization.

By singling out the Rock Island from all other companies and railroads in reorganization and imposing on it special, unprecedented burdens, the Rock Island Act clearly offends the due process and equal protection clauses of the fifth amendment.

Appellants argue that the Supreme Court has applied a presumption of validity to laws involving general "socio-economic" regulation. However, this presumption has not served to sustain acts such as the Rock Island legislation, which are "not even purportedly enacted to deal with a broad, generalized economic or social problem." Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978). Cases such as Usery v. Turner-Elkhorn, Mining Co., 428 U.S.

1 (1976), relied upon by the Milwaukee Trustee, support at most the proposition that regulation intended to effect a broad social goal may not be invalidated simply because the means employed to advance that goal incidentally disadvantages a specific generic group.

The Rock Island Act is sharply different from such legitimate regulatory schemes. The Rock Island Act is not directed to broad social goals of general applicability. Rather, the sole purpose of the Act is to mandate obligations in addition to those already in existence for the benefit of former employees of a business no longer in operation. Its effect is to alter the obligations of the Rock Island estate, as distinct from the estates of all other companies or railroads in reorganization. The Rock Island Act thus constitutes a particularized confiscation rather than legitimate regulation.

2. The Rock Island Act Constitutes An Unconstitutional Bill Of Attainder Because It Penalizes Only The Rock Island.

The Rock Island Act's labor protection scheme is the type of special punitive legislation which the constitutional prohibition of bills of attainder was designed to prevent. It penalizes the Rock Island for exercising its constitutional and statutory right to withdraw from losing railroad operations by imposing only upon the Rock Island extraordinary labor protection burdens. Bills of attainder are:

> [l]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial.

United States v. Lovett, 328 U.S. 303, 315 (1946). See also, e.g., United States v. Brown, 381 U.S. 437 (1965), Nixon v. Administrator of General Services, 443 U.S. 425, 475 (1976).

The Rock Island Act, in imposing special punitive labor protection costs on one named entity--the Rock Island estate--in derogation of the Reorganization Court's exclusive jurisdiction over the Rock Island estate, is clearly a bill of attainder.

C. The Rock Island Act Further Violates The Due Process And Separation Of Powers Principles By Its Extraordinary Curtailment Of Appellate Review.

The Rock Island Act violates the due process and separation of powers principles in one final major respect, by its extraordinary limitations on appellate review. The Staggers Rail Act amendment to Section 124 of the Rock Island Act appears to require that review of the Rock Island Act, as amended, occur before this Court within 60 days, despite the fact that an appeal as to the basic constitutional questions concerning the Rock Island Act scheme is already pending before the Supreme Court. Moreover, Section 124(a) appears to require that this proceeding be consolidated with the pending proceeding concerning the unrelated MRRA labor protection scheme.

If the unusual procedure required by Section 124(a) of the amended Rock Island Act was intended to strip the Supreme Court of its jurisdiction over a pending case, because the denials by Justice Stevens and the Court of the RLEA's stay motion reflected a sense in the Supreme Court that the Rock Island Act is unconstitutional, the principles of United States v. Klein, supra are violated.

This Congressional exercise in forum shopping has already resulted in extraordinary infringements of the rights of the Rock Island estate. Rather than permitting rational review of the Rock Island Act, the Act seeks to strip the Supreme Court of its proper appellate jurisdiction over a case pending under 28 U.S.C. § 1252. It appears to require this Court to assume jurisdiction to review (should it agree to do so) the subsidiary order of October 15, 1980 in a piecemeal fashion. Moreover, participation in these appeals by the Milwaukee Road Trustee has forced the Rock Island Trustee, creditors and shareholders to confront the Milwaukee Road Trustee as an adversary, although the Milwaukee Road case is wholly unrelated to the Rock Island situation, and the parties in the Milwaukee Road appeal did not participate in the proceedings before the Rock Island Reorganization Court. Finally, the extraordinary requirement that these

appeals be heard in an en banc proceeding, and determined within 60 days of the date the last appeal was filed, (exacerbated by the tardy filing of briefs by the Appellants) has resulted in a wholly inadequate period for briefing and argument of these appeals, including the preliminary matters to be addressed. The sum effect of this extraordinary Congressional interference with pending litigation has resulted in the procedural confusion surrounding these proceedings. The inevitable result is a further infringement of the constitutional rights of the Rock Island estate.

IV.

THE ROCK ISLAND ACT VIOLATES THE CONSTITUTIONAL REQUIREMENT THAT BANKRUPTCY LAWS BE UNIFORM.

Article I, Section 8, clause 4 of the United States Constitution provides that:

> The Congress shall have the power . . . to establish . . . uniform laws on the subject of Bankruptcies throughout the United States. (Emphasis supplied.)

This clause requires that legislation "on the subject of bankruptcies" must apply equally to all similar bankruptcies throughout the country.*/ In Hanover National Bank v.

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*/ The Supreme Court, in Continental Illinos National Bank and Trust Company v. Chicago, Rock Island and Pacific Ry. Co., 294 U.S. 648 (1935), stated that the "subject of bankruptcies" involves:

> [N]othing less than 'the subject of the relations between an insolvent or nonpaying

[Footnote continued on next page.]

Moyses, 186 U.S. 181, 188 (1902), the Supreme Court emphasized that "[t]he laws passed on the subject [of bankruptcies] must . . . be uniform throughout the United States. . . ."

In the 3R Act Cases, supra, the Supreme Court held the Regional Rail Reorganization Act of 1973 to be valid against a non-uniformity challenge. On its face, the 3R Act applied to railroad reorganizations in only a single, statutorily defined region. Despite discussion of the need to remedy geographically isolated conditions, the Court ultimately found that:

> No railroad reorganization proceeding, within the meaning of the [3R Act], was pending outside that defined region on the effective date of the Act or during the 180-day period following the statute's effective date. Thus, the [3R Act] in fact operates uniformly upon all bankrupt railroads then operating in the United States and uniformly with respect to all creditors of each of these railroads. (Emphasis supplied.)

419 U.S. at 159-160. Thus, nationwide geographic uniformity was de facto present under the 3R Act, and this factor was

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[Footnote continued from preceding page.]

> or fraudulent debtor, and his creditors, extending to his and their relief.' Id. at 673 quoting from In re Reiman 29 Fed. Cas. 490, 496-97 (19); see also Wright v. Union Central Life Insurance Company, 304 U.S. 502, 513-14 (1938).

The Rock Island Act is certainly bankruptcy legislation subject to the uniformity clause, because it involves the priority and use of government loans, the imposition of new debt on the debtor's estate, and the treatment of labor protection claims.

central to the findings in both the Special Court and the Supreme Court that the 3R Act did not violate the uniformity clause.*/

Unlike the 3R Act, the Rock Island Act is explicitly tailored and applicable to only one rail carrier in the process of reorganization and liquidation. Further, the Rock Island is treated differently from the Milwaukee Road, a Section 77 reorganization in the same judicial district. The de facto geographic uniformity which insulated the 3R Act from the effect of the uniformity clause cannot justify the unequal treatment of the Rock Island. The Rock Island

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*/ In his opinion for the Special Court, Judge Friendly explained that:

> 'The uniformity required by Article I, § 8, Clause 4, is geographical, not temporal. Cf. Hanover Nat'l Bank v. Moyses, supra. If the Act had been written to apply only to railroads that were in proceedings for reorganization under § 77 on the date of its enactment, objection on the ground of lack of uniformity would not have been even arguable. While the Act does not say in ipsissimis verbis that it applies only to such railroads, § 207(b) and the elaborate timetable provided in the Act make plain that such was the intent of Congress. Every such railroad was within the region defined in § 102(13) of the Act . . . .'

In the Matter of Penn Central Transportation Co., 384 F. Supp. 895, 916 (Special Ct., 1974).

The Supreme Court shared Judge Friendly's view:

> 'The argument that the Rail Act differs from the head tax statute because by its

[Footnote continued on following page.]

Act is unquestionably the narrowest piece of bankruptcy legislation imaginable.

In In re Sink, 27 F.2d 361 (W.D. Va. 1928), appeal dismissed, 30 F.2d 1019 (4th Cir. 1929), a law dealing with a single bankrupt and authorizing action by a single Federal district court was invalidated as a violation of the uniformity clause. The Sink court declared:

> Article 1, § 8, cl. 4, of the federal Constitution provides that Congress shall have the power to establish uniform laws on the subject of bankruptcies throughout the United States. A power to enact laws on the subject of 'bankruptcies' does not literally include the power to enact laws relating to a single bankruptcy. And that it was not the intention of the provision in question to give Congress power to so legislate, is clearly shown by the use of the word 'uniform.' In order that a bankruptcy statute shall be uniform it must apply to all bankruptcies. And a statute which applies to only one bankruptcy is as far from being uniform as is possible. It may further be said that every possible reason for using the two words in question is frustrated by a statute relating only to an individual bankruptcy.

27 F.2d at 361.

Thus, the Sink case is directly on point; and there can be no doubt that the Rock Island Act, as special

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[Footnote continued from preceding page.]

> own terms the Rail Act applies only to one designated region is without merit. The definition of the region does not obscure the reality that the legislation applies to all railroads under reorganization pursuant to § 77 during the time the Act applies.'

419 U.S. at 161 (emphasis supplied).

legislation directed to only one railroad in reorganization, is an unconstitutional non-uniform law on the subject of bankruptcy.*/

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*/ The Milwaukee Trustee's argument that the Sink court found the special legislation "non-uniform not because it applied to a single bankrupt, but because it vested special power exclusively in the district court for one geographic region" (Milw. Trustee Br. at 56), is clearly contrary to the explicit language of the case. The Sink Court's reference to the fact that the Sink statute applied only to one court or one judicial district indicates an additional reason why the act violates the uniformity clause.

CONCLUSION

For the foregoing reasons, the Trustee, creditors and shareholders respectfully request this Court to affirm the district court's Order of October 15, 1980.

Respectfully submitted,

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November 10, 1980

APPENDIX G

GENERAL BALANCE SHEETS AND INCOME STATEMENTS

1975–1979

WILLIAM M. GIBBONS, TRUSTEE OF
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR

General Balance Sheet as of December 31, 1975
in Accordance with Regulations of the Interstate Commerce Commission

ASSETS

CURRENT ASSETS	
701 - Cash	$ (1,322,478)
702 - Temporary cash investments	22,144,790
703 - Special deposits	4,698,433
705 - Traffic and car service balances, Dr.	4,445,889
706 - Net balance receivable from agents and conductors	9,371,886
707 - Miscellaneous accounts receivable	5,855,864
708 - Interest and dividends receivable	51,971
709 - Accrued accounts receivable	16,447,516
710 - Working fund advances	127,950
711 - Prepayments	1,452,033
712 - Material and supplies	22,388,804
713 - Other current assets	487,196
Total Current Assets	$ 86,249,854
SPECIAL FUNDS	
715 - Sinking Funds	$ -
716 - Capital and other reserve funds	604,689
717 - Insurance and other funds	-
Total Special Funds	$ 604,689
INVESTMENTS	
721 - Investments in affiliated companies	$ 17,882,630
722 - Other investments	1,239
Total Investments	$ 17,883,869
PROPERTIES	
731 - Road and equipment property	$502,154,345
732 - Improvements on leased property	1,933,927
Total Transportation Property	$504,088,272
733 - Accrued depreciation - Improvements on leased property	(309,949)
735 - Accrued depreciation - road and equipment	(173,469,923)
736 - Amortization of defense projects - road and equipment	(2,379,013)
Total Transportation Property Less Recorded Depreciation and Amortization	$327,729,387
737 - Miscellaneous physical property	4,458,510
738 - Accrued depreciation - miscellaneous physical property	(1,051,605)
Miscellaneous Physical Property Less Recorded Depreciation	$ 3,406,905
Total Properties Less Recorded Depreciation and Amortization	$331,136,292
OTHER ASSETS AND DEFERRED CHARGES	
741 - Other assets	$ 2,320,290
742 - Unamortized discount on long-term debt	686,923
743 - Other deferred charges	2,144,127
Total Other Assets and Deferred Charges	$ 5,151,340
Total Assets	$441,126,044

( ) Denotes credit

Note: In conformity with Order 42 issued by the United States District Court for the Northern District of Illinois - Eastern Division, No. 758-2697, the following special deposits in trust for the United States were made on the dates shown:

Federal Tax Withholding	$ 826,747.25	-	December 15, 1975
Federal Retirement Tax	231,305.01	-	December 15, 1975
Federal Tax Withholding	159,093.70	-	December 19, 1975
Federal Retirement Tax	46,499.10	-	December 19, 1975
Federal Tax Withholding	869,911.05	-	December 31, 1975
Federal Retirement Tax	301,798.65	-	December 31, 1975
Total:	$2,435,354.76		

WILLIAM M. GIBBONS, TRUSTEE OF
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR

General Balance Sheet as of December 31, 1975
In Accordance with Regulations of the Interstate Commerce Commission

LIABILITIES

CURRENT LIABILITIES		
752 - Traffic and car service balances, Cr.	$	1,240,358
753 - Audited accounts and wages payable		6,890,638
754 - Miscellaneous accounts payable		2,520,201
755 - Interest matured unpaid		7,084
756 - Dividends matured unpaid		-
757 - Unmatured interest accrued		63,883
759 - Accrued accounts payable		40,053,931
760 - Federal income taxes accrued		-
761 - Other taxes accrued		2,645,695
763 - Other current liabilities		4,008,098
Total Current Liabilities	$	57,429,888
LONG-TERM OBLIGATIONS DUE WITHIN ONE YEAR		
764 - Equipment obligations	$	1,302,789
LONG-TERM DEBT		
765 - Funded debt unmatured in hands of public	$	-
766 - Equipment obligations		3,582,335
768 - Debt in default		100,462,028
769 - Amounts payable to affiliated companies		1,071,523
Total Long-Term Debt	$	105,115,886
RESERVES		
771 - Pension and welfare reserves	$	560,000
774 - Casualty and other reserves		6,636,366
Total Reserves	$	7,196,366
OTHER LIABILITIES AND DEFERRED CREDITS		
781 - Interest in default	$	1,847,575
782 - Other liabilities (under reorganization proceedings)		70,929,590
782 - Other liabilities		13,028,105
784 - Other deferred credits		8,724,314
785 - Accrued liability - leased property		97,414
Total Other Liabilities and Deferred Credits	$	94,612,998
SHAREHOLDERS' EQUITY		
791 - Capital stock	$	146,058,050
798 - Retained income - unappropriated		25,586,398
Total Shareholders' Equity	$	171,644,448
Total Liabilities and Shareholders' Equity	$	437,302,375

Certified Correct:

Victor C. Blue
Comptroller

NOTE: The company's results of operations are included in Retained Income without adjustment which ultimately may result from company's entry into reorganization under the Bankruptcy Act on March 17, 1975. The obligations classified above as being in default are so classifed only because on March 17, 1975, the company filed a petition seeking reorganization under the Bankruptcy Act, which action is defined as an event of default in the instruments under which the obligations were issued.

March 12, 1976 - Audited

WILLIAM M. GIBBONS, TRUSTEE OF
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR

Income Statement
in Accordance with Regulations of the Interstate Commerce Commission

December 1975		January 1 to December 31 1975
	REVENUES	
$26,153,925	Freight	$301,575,426
460,350	Passenger	5,011,487
1,669,121	Other	14,983,997
28,283,396	Railway Operating Revenues	321,570,910
	EXPENSES	
5,031,621	M.of W.& S. Excl. Deprn.	40,644,955
227,534	Depreciation	2,734,492
4,643,049	M.of Equip. Excl. Deprn.	52,902,435
476,376	Depreciation	5,478,716
608,989	Traffic	7,439,032
5,889,941	Transportation	144,886,293
35,552	Dining Car Operations	389,769
1,359,258	General	13,605,184
18,272,320	Railway Operating Expenses	270,080,876
10,011,076	NET REVENUE FROM RAILWAY OPERATIONS	51,490,034
	RAILWAY TAX ACCRUALS (Excl. Income)	
238,349	General	6,111,285
147,940	Railroad Unemployment Insurance	1,885,416
1,622,970	Railroad Retirement	20,383,963
2,009,259	Total	28,380,664
	RENTS-DEBIT BALANCE	
494,139	Equipment - Time & Mileage	3,685,182
582,635	Private Carline Mileage	7,490,946
3,310,884	Other	36,617,262
178,496	Joint Facility	2,433,939
4,566,154	Total Rents	54,227,329
3,435,663	NET RAILWAY OPERATING INCOME	(31,117,959)
367,887	Non-Operating Income	4,549,492
(166,613)	Equity in earnings (losses) of affiliated companies	(655,747)
328,545	Miscellaneous Deductions from Income	676,880
3,308,392	INCOME AVAILABLE FOR FIXED CHARGES	(27,901,094)
196,018	Fixed Charges	2,331,796
-	Contingent Interest	-
3,112,374	INCOME (LOSS) BEFORE EXTRAORDINARY ITEMS	(30,232,890)
	EXTRAORDINARY ITEMS	
-	Loss on Derailment, Des Moines, Iowa	(933,016)
$3,112,374	NET INCOME (LOSS)	$(31,165,906)

Certified Correct:

Walter C Bohne
Comptroller

Notes:

1. The Company's results of operations are included in Retained Income without adjustment which ultimately may result from Company's entry into reorganization under the Bankruptcy Act on March 17, 1975.

2. Revaluation of assets as a result of possible permanent impairment and other adjustments which may be required as a result of examination and audit of the accounts are not reflected in this statement.

WILLIAM M. GIBBONS, TRUSTEE OF
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR (G-4)

GENERAL BALANCE SHEET AS OF DECEMBER 31, 1976
IN ACCORDANCE WITH REGULATIONS OF THE INTERSTATE COMMERCE COMMISSION

ASSETS

CURRENT ASSETS	
701 - Cash	$ (396,953)
702 - Temporary cash investments	20,016,362
703 - Special deposits	1,853,923
705 - Traffic and car service balances, Dr.	-
706 - Net balance receivable from agents and conductors	9,855,502
707 - Miscellaneous accounts receivable	4,974,604
708 - Interest and dividends receivable	21,583
709 - Accrued accounts receivable	15,246,873
710 - Working fund advances	126,826
711 - Prepayments	2,149,095
712 - Material and supplies	25,632,929
713 - Other current assets	541,758
Total Current Assets	$ 80,022,502
SPECIAL FUNDS	
715 - Sinking Funds	$ -
716 - Capital and other reserve funds	5,345,966
717 - Insurance and other funds	-
Total Special Funds	$ 5,345,966
INVESTMENTS	
721 - Investments in affiliated companies	$ 16,512,693
722 - Other investments	1,239
Total Investments	$ 16,513,932
PROPERTIES	
731 - Road and equipment property	$501,014,159
732 - Improvements on leased property	1,906,299
Total Transportation Property	$502,920,458
733 - Accrued depreciation - improvements on leased property	$ (533,587)
735 - Accrued depreciation - road and equipment	(176,586,846)
736 - Amortization of defense projects - road and equipment	(2,179,715)
Total Transportation Property Less Recorded Depreciation and Amortization	$323,620,310
737 - Miscellaneous physical property	4,449,040
738 - Accrued depreciation - miscellaneous physical property	(1,057,619)
Miscellaneous Physical Property Less Recorded Depreciation	$ 3,391,421
Total Properties Less Recorded Depreciation and Amortization	$327,011,731
OTHER ASSETS AND DEFERRED CHARGES	
741 - Other assets	$ 8,556,450
742 - Unamortized discount on long-term debt	628,880
743 - Other deferred charges	5,208,552
Total Other Assets and Deferred Charges	$ 14,393,882
Total Assets	$443,288,013

( ) Denotes credit

NOTE: In conformity with Order No. 42 issued by the United States District Court for the Northern District of Illinois-Eastern Division, No. 75B-2697, the following special deposits in trust for the United States were made on the dates shown:

Federal Withholding Tax	$1,044,572.81	December 15, 1976
Federal Retirement Tax	294,152.04	December 15, 1976
Federal Withholding Tax	1,042,953.64	December 30, 1976
Federal Retirement Tax	350,176.76	December 30, 1976
	$2,731,855.25	

WILLIAM M. GIBBONS, TRUSTEE OF
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR (G-5)

GENERAL BALANCE SHEET AS OF DECEMBER 31, 1976
IN ACCORDANCE WITH REGULATIONS OF THE INTERSTATE COMMERCE COMMISSION

LIABILITIES

CURRENT LIABILITIES	
752 - Traffic and car service balances, Cr.	$ 2,500,553
753 - Audited accounts and wages payable	9,896,891
754 - Miscellaneous accounts payable	2,954,572
755 - Interest matured unpaid	7,950
756 - Dividends matured unpaid	-
757 - Unmatured interest accrued	274,424
759 - Accrued accounts payable	44,651,122
760 - Federal income taxes accrued	-
761 - Other taxes accrued	5,922,960
763 - Other current liabilities	5,409,821
Total Current Liabilities	$ 71,618,293
LONG-TERM OBLIGATIONS DUE WITHIN ONE YEAR	
764 - Equipment obligations	$ 1,585,366
LONG-TERM DEBT	
765 - Funded debt unmatured in hands of public	$ -
766 - Equipment obligations	3,042,076
767 - Receivers' and Trustees' Securities	9,393,491
768 - Debt in default	100,462,028
769 - Amounts payable to affiliated companies	1,084,795
Total Long-Term Debt	$113,982,390
RESERVES	
771 - Pension and welfare reserves	$ 680,000
774 - Casualty and other reserves	9,061,205
Total Reserves	$ 9,741,205
OTHER LIABILITIES AND DEFERRED CREDITS	
781 - Interest in default	$ 4,304,756
782 - Other liabilities (under reorganization proceedings)	67,045,992
782 - Other liabilities	17,225,093
784 - Other deferred credits	11,098,318
785 - Accrued liability - leased property	89,539
Total Other Liabilities and Deferred Credits	$ 99,763,698
SHAREHOLDERS' EQUITY	
791 - Capital stock	$146,058,050
798 - Retained income - unappropriated	539,011
Total Shareholders' Equity	$146,597,061
Total Liabilities and Shareholders' Equity	$443,288,013

Certified Correct:

Victor C. Bohne
Comptroller

Notes:

1. The Company's results of operations are included in Retained Income without adjustment which ultimately may result from Company's entry into reorganization under the Bankruptcy Act on March 17, 1975. The obligations classified above as being in default are so classified only because on March 17, 1975, the company filed a petition seeking reorganization under the Bankruptcy Act, which action is defined as an event of default in the instruments under which the obligations were issued.

2. Adjustments normally made in year-end closing of accounts, revaluation of assets as a result of possible permanent impairment and other adjustments which may be required as a result of examination and audit of the accounts are not reflected in this statement.

February 11, 1977

WILLIAM M. GIBBONS, TRUSTEE OF
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR (G-6)

Income Statement
in Accordance with Regulations of the Interstate Commerce Commission

	DECEMBER 1976			
	Operations Exclusive of Rehabilitation Programs	Rehabilitation Programs	Total	1975
REVENUES				
Freight	$26,334,218	$ -	$26,334,218	$26,153,925
Passenger	376,687	-	376,687	460,350
Other	1,792,141	-	1,792,141	1,669,121
Railway Operating Revenues	28,503,046	-	28,503,046	28,283,396
EXPENSES				
M.of W.& S. Excl. Depreciation	4,106,986	1,852,108	5,959,094	5,031,621
Depreciation	230,455	-	230,455	227,534
M.of Equip. Excl. Depreciation	5,136,166	297,111	5,433,277	4,643,049
Depreciation	426,879	-	426,879	476,376
Traffic	598,338	-	598,338	608,989
Transportation	13,014,186	-	13,014,186	5,889,941
Dining Car Operations	32,165	-	32,165	35,552
General	1,148,695	-	1,148,695	1,359,258
Railway Operating Expenses	24,693,870	2,149,219	26,843,089	18,272,320
NET REVENUE FROM RAILWAY OPERATIONS	3,809,176	(2,149,219)	1,659,957	10,011,076
RAILWAY TAX ACCRUALS (Excl. Income)				
General	80,581	-	80,581	238,349
Railroad Unemployment Insurance	182,556	20,656	203,212	147,940
Railroad Retirement	1,775,426	200,976	1,976,402	1,622,970
Total	2,038,563	221,632	2,260,195	2,009,259
RENTS-DEBIT BALANCE				
Equipment - Time and Mileage	689,764	-	689,764	494,139
Private Carline Mileage	711,011	-	711,011	582,635
Other	3,478,992	-	3,478,992	3,310,884
Joint Facility	199,860	-	199,860	178,496
Total Rents	5,079,627	-	5,079,627	4,566,154
NET RAILWAY OPERATING INCOME	(3,309,014)	(2,370,851)	(5,679,865)	3,435,663
Non-Operating Income	791,400	-	791,400	367,887
Equity in Earnings (Losses) of Affiliated Companies	126,253	-	126,253	(166,613)
Miscellaneous Deductions from Income	155,854	-	155,854	328,345
INCOME AVAILABLE FOR FIXED CHARGES	(2,547,215)	(2,370,851)	(4,918,066)	3,308,392
Fixed Charges	268,852	-	268,852	196,018
Contingent Interest	-	-	-	-
NET INCOME (LOSS)	$(2,816,067)	$(2,370,851)	$(5,186,918)	$ 3,112,374

Certified Correct:

Walter C Blum
Comptroller

Notes:

1. The Company's results of operations are included in Retained Income without adjustment which ultimately may result from Company's entry into reorganization under the Bankruptcy Act on March 17, 1975.

2. Revaluation of assets as a result of possible permanent impairment and other adjustments which may be required as a result of examination and audit of the accounts are not reflected in this statement.

WILLIAM M. GIBBONS, TRUSTEE OF
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR
General Balance Sheet as of December 31, 1977

ASSETS

CURRENT ASSETS	
701 - Cash	$ (460,775)
702 - Temporary cash investments	16,843,455
703 - Special deposits	1,843,340
705 - Traffic and car service balances, Dr.	—
706 - Net balance receivable from agents and conductors	11,076,106
707 - Miscellaneous accounts receivable	8,716,386
708 - Interest and dividends receivable	22,534
709 - Accrued accounts receivable	15,971,155
710 - Working fund advances	126,726
711 - Prepayments	2,020,216
712 - Material and supplies	13,482,718
713 - Other current assets	543,566
Total Current Assets	$70,205,427
SPECIAL FUNDS	
715 - Sinking Funds	$ —
716 - Capital and other reserve funds	8,246,805
717 - Insurance and other funds	—
Total Special Funds	$ 8,246,805
INVESTMENTS	
721 - Investments in affiliated companies	$15,587,092
722 - Other investments	1,154
Total Investments	$15,588,246
PROPERTIES	
731 - Road and equipment property	$708,618,034
732 - Improvements on leased property	3,683,026
Total Transportation Property	$712,301,060
733 - Accrued deprn. - improvements on leased property	$ (2,189,522)
735 - Accrued deprn. - road and equipment	(351,248,018)
736 - Amortization of defense projects - road and equipment	(1,878,431)
Total Transportation Property Less Recorded Depreciation and Amortization	$356,985,089
737 - Miscellaneous physical property	4,449,952
738 - Accrued depreciation - misc. physical property	(1,109,610)
Miscellaneous Physical Property Less Recorded Deprn.	$ 3,340,342
Total Properties Less Recorded Deprn. and Amort.	$360,325,431
OTHER ASSETS AND DEFERRED CHARGES	
741 - Other assets	$ 5,006,196
742 - Unamortized discount on long-term debt	—
743 - Other deferred charges	5,219,742
Total Other Assets and Deferred Charges	$ 10,225,938
Total Assets	$464,631,847

( ) Denotes credit

NOTE: In conformity with Order No. 42 issued by the United States District Court for the northern district of Illinois-Eastern Division, No. 73B-2697, the following special deposits in trust for the United States were made on the dates shown:

FEDERAL WITHHOLDING TAX	$ 1,047,430.82	December 13, 1977
FEDERAL RETIREMENT TAX	287,023.89	December 13, 1977
FEDERAL WITHHOLDING TAX	1,056,224.43	December 28, 1977
FEDERAL RETIREMENT TAX	348,653.00	December 28, 1977
	$ 2,739,332.14	

WILLIAM M. GIBBONS, TRUSTEE OF
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR
General Balance Sheet as of December 31 , 1977

LIABILITIES

CURRENT LIABILITIES	
752 - Traffic and car service balances, Cr.	$ 5,141,244
753 - Audited accounts and wages payable	6,508,430
754 - Miscellaneous accounts payable	8,133,242
755 - Interest matured unpaid	7,668
756 - Dividends matured unpaid	—
757 - Unmatured interest accrued	633,568
759 - Accrued accounts payable	43,355,158
760 - Federal income taxes accrued	—
761 - Other taxes accrued	5,744,572
763 - Other current liabilities	8,766,411
Total Current Liabilities	$ 78,290,313
LONG-TERM OBLIGATIONS DUE WITHIN ONE YEAR	
764 - Equipment obligations	$ 1,608,409
LONG-TERM DEBT	
765 - Funded debt unmatured in hands of public	$ --
766 - Equipment obligations	1,824,612
767 - Receivers' and Trustees' Securities	16,938,917
768 - Debt in default	100,462,028
769 - Amounts payable to affiliated companies	1,284,784
770.1 - Unamortized discount on long term debt	(371,483)
Total Long-Term Debt	$ 119,938,858
RESERVES	
771 - Pension and welfare reserves	$ 712,959
774 - Casualty and other reserves	11,152,192
Total Reserves	$ 11,865,151
OTHER LIABILITIES AND DEFERRED CREDITS	
781 - Interest in default	$ 6,462,093
782 - Other liabilities	15,137,960
782 - Other Liabilities (under reorganization proceedings)	
Incurred prior to reorganization	57,774,363
Incurred subsequent to reorganization	10,097,484
784 - Other deferred credits	12,414,344
785 - Accrued Liability - leased property	93,154
Total Other Liabilities and Deferred Credits	$ 101,941,708
SHAREHOLDER'S EQUITY	
791 - Capital stock	$ 146,058,050
798 - Retained income - unappropriated	4,929,658
Total Shareholders' Equity	$ 150,987,708
Total Liabilities and Shareholders' Equity	$ 464,631,347

Certified Correct:

Victor C. Bohna
Comptroller

NOTE: The Company's results of operations are included in Retained Income without adjustment which ultimately may result from Company's entry into reorganization under the Bankruptcy Act on March 17, 1975. The obligation classified above as being in default are so classified only because on March 17, 1975, the company filed a petition seeking reorganization under the Bankruptcy Act, which action is defined as an event of default in the instruments under which the obligations were issued.

WILLIAM [illegible], TRUSTEE OF
CHICAGO, ROCK ISLAND AND [illegible] RAILROAD COMPANY, DEBTOR

INCOME STATEMENT

	TWELVE MONTHS ENDED DEC. 31, 1977	DEC. 31, 1976
REVENUES		
Freight	$317,037,473	$ 317,750,925
Passenger	4,681,113	4,761,832
Other	21,252,621	18,807,301
Railway Operating Revenues	342,971,217	341,320,058
EXPENSES		
M.of W.& S. Excl. Depreciation	37,611,020	29,837,662
Depreciation	13,434,409	12,892,589
M.of Equip. Excl. Depreciation	56,667,790	50,557,050
Depreciation	5,141,376	5,199,795
Traffic	7,458,975	7,279,877
Transportation	159,121,710	148,596,733
Dining Car Operations	198,325	212,176
General	16,259,648	15,530,097
Railway Operating Expenses	295,951,453	270,125,979
NET REVENUE FROM RAILWAY OPERATIONS	47,019,764	71,194,079
RAILWAY TAX ACCRUALS (Excl. Income)		
General	3,701,473	5,543,872
Railroad Unemployment Insurance	3,349,798	2,331,404
Railroad Retirement	21,468,074	20,491,867
Total	28,519,347	28,367,143
RENTS-DEBIT BALANCE		
Equipment - Time and Mileage	8,822,094	8,321,999
Private Carline Mileage	8,749,588	7,415,624
Other	43,313,617	38,395,518
Joint Facility	1,327,811	2,486,283
Total Rents	62,213,110	56,619,424
NET RAILWAY OPERATING INCOME	(23,732,693)	(14,092,488)
Non-Operating Income	8,900,040	4,279,023
Equity in Earnings (Losses) of Affiliated Companies	(1,194,837)	(40,774)
Miscellaneous Deductions from Income	754,610	1,670,041
INCOME AVAILABLE FOR FIXED CHARGES	(16,772,300)	(11,524,270)
Fixed Charges	3,320,307	2,499,498
Contingent Interest		
NET INCOME (LOSS) Before Extraordinary Items	(20,093,107)	(14,024,274)
Cumulative effect on pr.yrs.(thru 12/31/75) of change in method of acctg.for trk.struc.		13,460,441
NET INCOME (LOSS)	$(20,093,107)	$ (563,833)

Certified Correct:

Victor C. Bohne
Comptroller

Note: The Company's results of operations are included in Retained Income without adjustment which adjustment may result from Company's entry into reorganization under the Bankruptcy Act on March 17, 1975.

February 21, 1978

WILLIAM H. GIBBONS, TRUSTEE OF
CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, DEBTOR

General Balance Sheet as of December 31, 1978

ASSETS

CURRENT ASSETS		
701 - Cash		$ (4,617,086)
702 - Temporary cash investments		21,102,305
703 - Special deposits		2,154,321
705 - Accounts Receivable; interline and other balances		-
706 - Accounts Receivable; customers		14,873,402
707 - Accounts Receivable; other		7,689,634
708 - Interest and dividends receivable		32,161
708.5 - Receivables from affiliated companies		247,834
709 - Accrued accounts receivable		21,798,433
709.5 - Allowance for uncollectible accounts		(125,000)
710 - Working fund advances		129,346
711 - Prepayments	$ 2,580,041	
Capitalized Equip leases; non-recourse	338,000	2,918,041
712 - Material and supplies		16,238,531
713 - Other current assets		485,401
Total Current Assets		$ 82,897,323
SPECIAL FUNDS		
715 - Sinking Funds		$ -
716 - Capital Funds		9,169,767
717 - Insurance and other funds		-
Total Special Funds		$ 9,169,767
INVESTMENTS		
721 - Investments and advances; Affiliated companies		$ 15,926,390
721.5 - Adj; other investments and advances Affiliated Co's		(695,956)
722 - Other investments and advances		1,154
Total Investments and Advances		$ 15,231,588
PROPERTIES		
731 - Road and equipment property	$ 714,305,260	$ -
Capitalized equipment leases; non-recourse	121,523,000	$ 835,828,260
732 - Improvements on leased property		3,683,026
Total Transportation Property		$ 839,511,286
733 - Accumulated depreciation - improvmt on leased prpty		$ (2,313,144)
735 - Accumulated depreciation;		
Road and equipment	$(357,735,894)	-
Capitalized equipment leases; non-recourse	(43,370,000)	$(401,105,894)
736 - Amortization of defense projects - road and equipment		(1,855,121)
Total Transportation Property Less Recorded Depreciation and Amortization		$ 434,237,127
737 - Property used in other than carrier operations		4,477,271
738 - Accumltd deprn; prpty used in other than carrier oprns.		(1,135,526)
Prpty used in other than carrier oprns less Recorded Depreciation		$ 3,341,745
Total Properties Less Recorded Depreciation and Amortization		$ 437,578,872
OTHER ASSETS AND DEFERRED CHARGES		
739 - Organization Expenses		$ -
741 - Other assets		8,233,008
743 - Other deferred charges		5,348,180
Total Other Assets and Deferred Charges		$ 13,581,188
Total Assets		$ 558,458,738

( ) Denotes credit

Note: 1. In conformity with Order No. 42 issued by the United States District Court for the Northern District of Illinois-Eastern Division, No.75B-2697, the following special deposits in trust for the United States were made on the dates shown:

Federal Withholding Tax	$ 1,353,678.82	December 13, 1978
Federal Retirement Tax	130,411.27	December 13, 1978
Federal Withholding Tax	1,246,193.49	December 28, 1978
Federal Retirement Tax	414,609.15	December 28, 1978
	$ 3,144,892.73	

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WILLIAM M. GIBBONS, TRUSTEE OF
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR

General Balance Sheet as of December 31, 1978

LIABILITIES

CURRENT LIABILITIES			
752 - Accounts payable; interline and other balances			$ 4,425,074
753 - Audited accounts and wages payable			9,375,478
754 - Accounts payable: other			7,305,919
755 - Interest and dividends payable	$ 777,552		
Capitalized equipment leases: non-recourse	1,351,000		2,128,552
756 - Dividends payable			-
757 - Payables to affiliated companies			-
759 - Accrued accounts payable			54,309,401
760 - Federal income taxes accrued			-
761.5 - Other taxes accrued			7,564,820
763 - Other current liabilities			16,295,429
Total Current Liabilities			$ 101,404,673
LONG-TERM OBLIGATIONS DUE WITHIN ONE YEAR			
764 - Equipment obligations	$1,088,981		
Capitalized equipment leases: non-recourse	6,575,000		$ 7,663,981
LONG-TERM DEBT			
765 - Funded debt unmatured			$ -
766 - Equipment obligations			1,287,919
766.5 - Capitalized lease obligations			83,529,000
767 - Receivers' and Trustees' Securities			21,091,993
768 - Debt in default			100,462,028
769 - Accounts payable; affiliated companies			1,313,180
770.1 - Unamortized debt discount			-
Total Long-Term Debt			$ 207,684,120
RESERVES			
771 - Accrued liability; pension and welfare			$ 809,245
772 - Accrued liability; leased property			96,755
774 - Accrued liability; casualty and other claims			12,087,620
Total Reserves			$ 12,993,620
OTHER LIABILITIES AND DEFERRED CREDITS			
781 - Interest in default			$ 16,900,926
782 - Other liabilities			8,433,993
782 - Other liabilities (under reorganization proceedings)			
Incurred prior to reorganization			56,111,035
Incurred subsequent to reorganization			11,838,050
784 - Other deferred credits			11,339,635
Total Other Liabilities and Deferred Credits			$ 104,623,639
SHAREHOLDERS' EQUITY			
791 - Capital stock			$ 146,058,050
798 - Retained income - unappropriated			(21,969,345)
Total Shareholders' Equity			$ 124,088,705
Total Liabilities and Shareholders' Equity			$ 558,458,738

Certified Correct:

Victor C. Bohne
Comptroller

Note: 1. The Company's results of operations are included in Retained Income without adjustment which ultimately may result from Company's entry into reorganization under the Bankruptcy Act on March 17, 1975. The obligation classified above as being in default are so classified only because on March 17, 1975, the company filed a petition seeking reorganization under the Bankruptcy Act, which action is defined as an event of default in the instruments under which the obligations were issued.

/bjc-6

WILLIAM N. GIBBONS, TRUSTEE OF
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR
INCOME STATEMENT

	December 1978	Year 1978	Restated * 1977
REVENUES			
Freight	$27,326,020	$363,749,170	$337,037,478
Passenger	430,900	5,041,932	4,681,118
Other	2,007,748	20,824,396	21,252,621
Railway Operating Revenues	29,764,668	391,615,498	362,971,217
EXPENSES			
Way & Structures Excl. Depreciation	3,015,237	42,747,666	42,400,924
" " Depreciation	1,172,440	13,882,545	13,484,409
Equipment Excluding Depreciation	9,498,689	112,647,978	105,820,324
" Depreciation	1,150,311	13,794,978	13,724,576
Transportation	16,523,330	184,644,221	173,963,061
General & Administrative	2,020,966	32,639,368	28,916,816
Railway Operating Expenses	33,380,973	400,356,756	378,310,110
NET REVENUE FROM RAILWAY OPERATIONS	(3,616,305)	(8,741,258)	(15,338,893)
Other Income	1,789,347	8,103,410	8,900,040
Equity in Earnings (Losses) of Affiltd.Cos.	300,399	680,876	(1,194,837)
Miscellaneous Deductions from Income	325,116	1,348,339	754,610
INCOME AVAILABLE FOR FIXED CHARGES	(1,851,473)	(1,305,331)	(8,388,300)
Fixed Charges	1,365,145	15,872,671	16,011,807
Contingent Interest	-	-	-
NET INCOME (LOSS) (SEE NOTE)	$(3,216,618)	$(17,178,002)	$(24,400,107)

Certified Correct:

Victor C Bohne
Comptroller

* Restated to conform to 1978 accounting requirements.

NOTES: 1. In November 1976 the Financial Accounting Standards Board issued its Statement No. 13 "Accounting for Leases" requiring leases meeting certain criteria to be capitalized. Retroactive accounting was optional for leases implemented prior to January 1, 1978. This rule was adopted by the Interstate Commerce Commission in their Order No. 36604 dated October 12, 1977. Subsequently, the Securities and Exchange Commission in their Accounting Series Release No. 225 made retroactive adjustment mandatory in statements for companies with fiscal years ending after December 24, 1978. Accordingly, the table below reflects the required adjustment included in the above figures.

LOSS BEFORE RETROACTIVE ADOPTION OF F.A.S. 13.	$(2,946,368)	$(13,935,002)	$(20,093,107)
Increase in depreciation	(727,833)	(8,734,000)	(8,563,000)
Increase in interest	(1,014,667)	(12,176,000)	(12,691,000)
Decrease in rents	1,472,250	17,667,000	16,947,000
Net effect on loss	(270,250)	(3,243,000)	(4,307,000)
Loss for the period (after adjustments) as above	$(3,216,618)	$(17,178,002)	$(24,400,107)

2. The Company's results of operations are included in Retained Income without adjustment which ultimately may result from Company's entry into reorganization under the Bankruptcy Act on March 17, 1975.

3. Revaluation of assets as a result of possible permanent impairment and other adjustments which may be required as a result of examination and audit of the accounts are not reflected in this statement.

February 14, 1979

WILLIAM M. GIBBONS, TRUSTEE OF
CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, DEBTOR
UNAUDITED
Preliminary General Balance Sheet as of December 31, 1979

ASSETS

CURRENT ASSETS			
701 - Cash			$ (2,384,230)
702 - Temporary cash investments			14,120,000
703 - Special deposits			299,533
705 - Accounts Receivable: interline and other balances			-
706 - Accounts Receivable: customers			-
707 - Accounts Receivable: other			7,722,847
708 - Interest and dividends receivable			10,660
708.5 - Receivables from affiliated companies			620,664
709 - Accrued accounts receivable			80,208,879
709.5 - Allowance for uncollectible accounts			(125,000)
710 - Working fund advances			129,346
711 - Prepayments	$ 111,026		
Capitalized Equip leases	-		111,026
712 - Material and supplies			-
713 - Other current assets			-
Total Current Assets			$ 100,713,725
SPECIAL FUNDS			
715 - Sinking Funds			$ -
716 - Capital Funds			10,849,481
717 - Insurance and other funds			-
Total Special Funds			$ 10,849,481
INVESTMENTS			
721 - Investments and advances: Affiliated companies			$ 15,993,350
721.5 - Adj: other investments and advances Affiliated Co's			(968,215)
722 - Other investments and advances			1,154
Total Investments and Advances			$ 15,026,289
PROPERTIES			
731 - Road and equipment property	$ 721,271,141		$
Capitalized equipment leases	121,227,000		842,498,141
732 - Improvements on leased property			3,682,413
Total Transportation Property			$ 846,180,554
733 - Accumulated depreciation - improvmt on leased pcpty			$ (2,436,767)
735 - Accumulated depreciation:			
Road and equipment	$(371,332,304)		
Capitalized equipment leases	(51,273,000)		$(422,605,304)
736 - Amortization of defense projects - road and equipment			(1,855,06a)
Total Transportation Property Less Recorded Depreciation and Amortization			$ 419,283,417
737 - Property used in other than carrier operations			4,479,249
738 - Accumltd depctn: prpty used in other than carrier oprns.			(1,187,620)
Prpty used in other than carrier oprns less Recorded Depreciation			$ 3,291,629
Total Properties Less Recorded Depreciation and Amortization			$ 422,575,046
OTHER ASSETS AND DEFERRED CHARGES			
739 - Organization Expenses			$ -
741 - Other assets	$ 6,953,092		
Capitalized equipment leases	1,388,000		8,341,092
743 - Other deferred charges			7,504,000
Total Other Assets and Deferred Charges			$ 15,845,092
Total Assets			$ 565,009,633

( ) Denotes credit

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WILLIAM H. [illegible], TRUSTEE OF
CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, DEBTOR
DEBTOR IN POSSESSION

Preliminary General Balance Sheet as of December 31, 1979

LIABILITIES

CURRENT LIABILITIES		
752 - Accounts payable: interline and other balances		$ 14,155,168
753 - Audited Accounts and wages payable		1,654,062
754 - Accounts payable: other		30,064,726
755 - Interest and dividends payable	$2,092,047	
Capitalized equipment leases	1,250,000	3,342,047
756 - Dividends payable		-
757 - Payables to affiliated companies		-
759 - Accrued accounts payable		66,705,563
760 - Federal income taxes accrued		-
761.5 - Other taxes accrued		2,253,654
763 - Other current liabilities		2,214,560
Total Current Liabilities		$ 120,389,780
LONG-TERM OBLIGATIONS DUE WITHIN ONE YEAR		
764 - Equipment obligations	$ 948,904	
Capitalized equipment leases	7,132,000	
Other Obligations	3,484,000	11,564,904
LONG-TERM DEBT		
765 - Funded debt unmatured		$ -
766 - Equipment obligations		1,107,165
766.5 - Capitalized lease obligations		76,191,000
767 - Receivers' and Trustees' Securities		35,865,992
768 - Debt in default		100,462,028
769 - Accounts payable: affiliated companies		1,210,416
Total Long-Term Debt		$ 214,836,601
RESERVES		
771 - Accrued liability: pension and welfare		$ 929,245
772 - Accrued liability: leased property		100,346
774 - Accrued liability: casualty and other claims		12,730,516
Total Reserves		$ 13,760,107
OTHER LIABILITIES AND DEFERRED CREDITS		
781 - Interest in default		$ 18,864,663
782 - Other liabilities		16,730,904
782 - Other liabilities (under reorganization proceedings)		
Incurred prior to reorganization		56,935,217
Incurred subsequent to reorganization		14,342,351
784 - Other deferred credits		47,139,636
Total Other Liabilities and Deferred Credits		$ 154,012,771
SHAREHOLDERS' EQUITY		
791 - Capital stock		$ 146,058,050
798 - Retained income - unappropriated		(95,612,580)
Total Shareholders' Equity		$ 50,445,470
Total Liabilities and Shareholders' Equity		$ 565,009,633

Certified Correct:

Comptroller

Notes: 1. The Company's results of operations are included in Retained Income without adjustment which ultimately may result from Company's entry into reorganization under the Bankruptcy Act on March 17, 1975. The obligation classified above as being in default are so classified only because on March 17, 1975, the company filed a petition seeking reorganization under the Bankruptcy Act, which action is defined as an event of default in the instruments under which the obligations were issued.

2. Adjustments normally made in year-end closing of accounts, revaluation of assets as a result of possible permanent impairment and other adjustments which may be required as a result of examination and audit of the accounts are not reflected in this statement.

3. The above statement was prepared without benefit of an agreement between the Trustee of the Chicago, Rock Island and Pacific Railroad Company and the Kansas City Terminal Company, Directed Rail Carrier for use of Trustee's property and/or costs of services rendered by the Directed Rail Carrier for the Trustee. Such items were included [illegible]

WILLIAM M. GIBBONS, TRUSTEE OF
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR
PRELIMINARY INCOME STATEMENT
UNAUDITED

	DECEMBER, 1979	DECEMBER, 1978
REVENUES		
Freight	$ 3,320,721	$ 27,326,020
Passenger	(340)	430,900
Other	595,477	2,007,748
Railway Operating Revenues	4,115,858	29,764,668
EXPENSES		
Way & Structures Excl. Depreciation	96,153	3,015,237
" " " Depreciation	1,190,395	1,172,440
Equipment Excl. Depreciation	468,699	9,498,689
" Depreciation	1,259,997	1,150,311
Transportation	1,212,719	16,523,330
General & Administrative	782,023	2,020,966
Railway Operating Expenses	5,010,186	33,380,973
NET REVENUE FROM RAILWAY OPERATIONS	(894,328)	(3,616,305)
Other Income	919,157	1,789,347
Equity in Earnings (Losses) of Affiltd. Co	(82,158)	300,599
Miscellaneous Deductions from Income	684,005	325,114
INCOME AVAILABLE FOR FIXED CHARGES	(741,334)	(1,851,473)
Fixed Charges	1,483,129	1,365,145
Contingent Interest	-	-
NET INCOME (LOSS)	$ (2,224,463)	$ (3,216,618)

Certified Correct:

Comptroller

Notes: 1. The Company's results of operations are included in Retained Income without adjustment which ultimately may result from Company's entry into reorganization under the Bankruptcy Act on March 17, 1975.

2. Adjustments normally made in year-end closing of accounts, revaluation of assets as a result of possible permanent impairment and other adjustments which may be required as a result of examination and audit of the accounts are not reflected in this statement.

3. In conformity with I.C.C. Order #34604 dated October 12, 1977, certain leased equipment acquired has been capitalized. The effect of this requirement results in adjustments increasing net loss for December, 1979 by $389,000 and increasing net loss for December, 1978 by $270,000.

4. Equipment expenses include progressed repairs made with funds borrowed under contract with the FRA and repairs made under shipper sponsorship loans. FRA repairs made after October 4, 1979 have been paid by the Kansas City Terminal Co. (D.R.C.) and accrued by the Trustee as an expense. FRA repairs in December, 1979 were $628,000 and $503,000 in the same month of 1978. No shipper sponsorship repairs were made in December, 1979 and $563,000 in December, 1978.

5. The above statement was prepared without benefit of an agreement between the Trustee of the Chicago, Rock Island and Pacific Railroad Company and the Kansas City Terminal Company, Directed Rail Carrier for use of Trustee's property and/or costs of services rendered by the Directed Rail Carrier for the Trustee. Such items were included on an estimated basis and may be subsequently adjusted.

March 11, 1980
/bjt-4

APPENDIX H

RESPONSE OF INTERVENORS CROWN, ET AL. TO TRUSTEE'S REPORT

September 6, 1979

IN THE UNITED STATE DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of	)	
	)	In Proceedings for the
CHICAGO, ROCK ISLAND AND	)	Reorganization of a
PACIFIC RAILROAD COMPANY,	)	Railroad
	)	
Debtor.	)	No. 75 B 2697

RESPONSE OF INTERVENORS CROWN ET AL. TO TRUSTEE'S REPORT FOR 1978 AND FOUR MONTHS 1979

ALBERT E. JENNER, JR.
DANIEL R. MURRAY
CARTER H. KLEIN
LINDA H. MULLENBACH
JENNER & BLOCK
One IBM Plaza
Room 4400
Chicago, Illinois 60611
312/222-9350

September 6, 1979

Island for the entire year in 1978, and is over double the number of carloads carried in the first half of 1979.

In summary, then, there has been no long-term improvement in the Rock Island's traffic either in 1978 or in the first half of 1979. On the contrary, since Mr. Manos uttered his confident prediction to the Court that the Rock Island had "turned the corner," the Rock Island traffic has stagnated, and in the first half of 1979 has deteriorated.

These conclusions are confirmed from three different perspectives:

(1) in terms of the Rock Island's own past performance,

(2) in terms of the performance of other Western District Railroads, and

(3) as measured against the Trustee's own forecasts.

In short, the Rock Island's depressed carloading level remains stagnant or has deteriorated, while the traffic of its competitors has been increasing.

B. EARNINGS

The second criterion on which we must judge the Rock Island's performance is its earnings. Last September, Mr. Manos represented to the Court that:

> "we are close, now -- close as we have been in the three and a half years of this reorganization -- to the formulation and filing of a plan. I state that with confidence."

(Tr. Sept. 18, 1978, at p.5.)

The basis for Mr. Manos' confidence was the upturn in carloadings and profitability he discerned in the summer and fall of 1978. In order to test that confidence, we must look to the earnings record of the Rock Island in 1978 and subsequently in 1979. Specifically, we must view that record from three different perspectives:

(1) in the light of the Rock Island's prior history of earnings,

(2) in light of the earnings of other railroads, and

(3) in light of the Trustee's own forecasts.

From all three perspectives, the magnitude of the Rock Island's losses in 1978 and the first half of 1979 is staggering. Those losses prove conclusively that the Rock Island is not reorganizable on an income basis.

(1) <u>The Rock Island's earnings history</u>.

Last September, Mr. Manos made the following representations to the Court:

> "What I am saying, your Honor, is that our act was in place -- if it wasn't for that hard winter [1977-1978], I don't believe that we would even have, at this moment, the accumulated deficit

> through July of eleven or twelve million -- I think it's less -- it's eleven million now, it's going down. However, since then, the Rock Island has dramatically reversed the trend. In May, it had a profit, on a fully accrued basis of $234,000 -- that's a black bottom line.
>
> "How did we do it? We had carloads of 66,887 cars versus 65,540 in 1977, when we lost a small amount -- $225,000.
>
> "In June, the Rock Island had a profit of $1,070,000, on a fully accrued basis; and it did it with 68,086 cars, an increase over 1977, when we had 65,295 cars.
>
> "In July, we had a small loss of less than a half a million dollars; but there we had the loss because our carloadings went down a little bit to 60,025 cars as against 62,407 in 1977. But it proved a point that when we go below a certain figure on monthly carloads, we have a small loss. But I say to your Honor that we are going to have consistant months, now, in profitability of over 65,000 carloads per month. That is going to be the pattern, in my opinion -- I'm cautiously optimistic about that from here on in."

(Tr. Sept. 18, 1978, at pp. 16-17) (Emphasis added).

Mr. Manos repeated and strengthened that pledge later in his report:

> "No way is the Rock Island going to lose twenty or $22,000,000 annually from here on in -- it's not going to happen. It happened in the first six months, but it's not going to happen in the last half of 1978, your Honor, I assure you."

(Tr. Sept. 18, 1978, at p. 101) (Emphasis added).

Unfortunately, Mr. Manos' confidence was misplaced. Table X displays the monthly losses of the Rock Island in 1978.

TABLE X

ROCK ISLAND NET INCOME (LOSS)

1978

(in millions of dollars)

	ICC Basis	Rock Island's Depreciation Basis
January	(3.8)	(3.9)
February	(4.8)	(5.6)
March	(.6)	(1.7)
April	(1.5)	(1.6)
May	(.2)	.2
June	.4	1.1
July	(.5)	.5
August	.5	.5
September	(.5)	.8
October	.4	1.4
November	(2.7)	(2.1)
December	(3.6)	(3.2)

The Rock Island did break slightly into the black in the summer and early fall -- traditionally its best months. But the familiar pattern of losses resumed in November -- with a vengeance. As a result, in 1978 after year-end adjustments, the Rock Island lost $21.2 million on an ICC accounting basis and $17.9 million on the Trustee's own depreciation accounting basis. These figures would have been much larger had the Trustee paid his employees the national wage scale and properly maintained his physical plant.

Current losses of the Rock Island are the largest it has ever experienced in its 105 year history. This is so even though the losses represent the experience of only six months, as shown by Table XI below.

TABLE XI

ROCK ISLAND LOSSES
January-June, 1979

(in millions of dollars)

	ICC Basis	Depreciation Basis
January	(8.6)	(9.1)
February	(10.5)	(11.4)
March	(9.6)	(10.2)
April	(5.9)	(6.0)
May	(5.7)	(6.0)
June	(4.6)	(4.0)
Total	(45.1)	(46.7)

Although the Trustee blames the severe winter for his losses, that reason fails to explain why losses are so great in the months of March, April, May and June, months which customarily benefit from revenue traffic that could not be hauled earlier because of the winter. Where are the benefits of the new locomotive power? Where are the benefits of the thousands of new and rehabilitated cars that the Trustee has prevailed upon the Court to obtain? Where are the benefits of the Trustee's much touted rehabilitation and marketing efforts? Translated into earnings, they are nowhere to be seen.

The Trustee's insistence upon a traditional income based reorganization of the Rock Island is frightening because of the Rock Island's consistent pattern of losses since 1965--a period approaching 15 years. The magnitude of those losses now exceeds a staggering quarter of a billion dollars. Over sixty percent of that sum, $157.3 million, has been incurred in the post-reorganization years from 1975 through June, 1979.

Yearly losses, particularly since 1974, have accelerated, as shown by Table XII below:

TABLE XII

ROCK ISLAND NET LOSSES
1965-1979
ICC Accounting

(in millions of dollars)

Year	Net Loss
1965	(1.5)
1966	(3.6)
1967	(16.7)
1968	(4.8)
1969	(9.8)
1970	(16.6)
1971	(6.4)
1972	(5.9)
1973	(15.0)
1974	(23.1)
1975	(31.2)
1976	(25.0)
1977	(34.8)
1978	(21.2)
1979*	(45.1)
Total	($260.7)

* Six months only.

Another informative, historical comparison of earnings that demonstrates the accelerated losses of the Rock Island comes from page four of the Trustee's Report for the Rock Island for 1976. Compared in that Report are the Rock Island's earnings for the five-year period 1972-1976 on the Trustee's own depreciation accounting basis. The Trustee's comparisons show, amazingly, that instead of a loss, in 1972, the Rock Island operated at a profit, and that losses in pre-reorganization years were less than they would be on an ICC accounting basis, as demonstrated in Table XIII below. (This calls into serious question the Trustee's statements that under prior management the Rock Island was undermaintained in pre-reorganization periods, or, more likely, shows that the depreciation method of accounting is an unreliable indicator of proper maintenance levels.)

TABLE XIII

ROCK ISLAND NET INCOME (LOSS)

1972-1979

(in millions of dollars)

Year	Depreciation	ICC
1972	1.5	(5.9)
1973	(13.5)	(15.0)
1974	(17.5)	(23.1)
1975	(25.0)	(31.2)

1976	(14.0)	(25.0)
1977	(24.4)	(34.8)
1978	(17.2)	(21.2)
1979*	(46.7)	(45.6)

*Six months only.

The Trustee's Report describes 1978 as a "pivotal" year for the Rock Island -- another way of saying that in 1978 the Rock Island "turned the corner." Trustee's Report, p. 5. One might ask pivotal to what? The Trustee presumably finds solace in the fact that the Trustee had smaller losses in 1978 than in 1977. But the same could have been said about 1976, because it too was preceded by a year with larger losses. 1976, however, was followed by a year with greater losses - a cycle the Rock Island will obviously duplicate in 1979. In any event, it is inconceivable how the Trustee can take solace in losses ranging from $17 to $21 million (depending on the method of accounting).

Nevertheless, a comparison of the Trustee's "pivotal" year 1978 with 1976 might be instructive to ascertain if any real progress has been made in these proceedings in that two-year period. The Rock Island fared about the same income-wise in 1978 as it did in 1976, as Table XIV below shows. The table also reveals, however, that from an operations standpoint, the Rock Island fared much worse in 1978 than it did in 1976.

TABLE XIV

ROCK ISLAND INCOME PERFORMANCE

1978 VS. 1976

(depreciation basis)

(in thousands of dollars)

	1978	1976
Revenues	391,615	341,320
Expenses	409,290	355,412
Net Railway Operating Income	(17,675)	(14,092)
Income Available for Fixed Charges	(10,239)	(11,357)
Net Income (Loss) (without capitalization of leases)	(13,935)	(13,857)

Table XIV shows that 1978 was, if anything, a significantly worse year than 1976, as far as income generated from operations is concerned. In 1976 the Rock Island suffered net railway operating losses of $14.1 million compared with $17.7 million for 1978, or $3.6 million worse in 1978. Thus, operating losses were 25% greater in 1978 than they were in 1976, using the Trustee's own depreciation method of accounting. It was only because the Trustee received $7.4 million in nonoperating income and other nonoperating credits compared with $2.7 million in 1976, that the Trustee was able to generate negative

income for fixed charges and net losses in 1978 no worse than that of 1976.

(2) Comparison with other railroads.

At the status report last September, Mr. Manos asserted that the Rock Island's heavy losses in the winter months were no different from the losses experienced by other railroads:

> "Your Honor, I repeat that the first four months were a loss -- we lost 12.8 million through April -- there was a reason for that. There was a very heavy winter [1977-78], as you recall, your Honor. This is not something that the Rock Island experienced alone; this is something that all of the railroads experienced."

(Tr. Sept. 18, 1978, at pp. 15-16.)

An examination of the reports rendered by other railroads reveals Mr. Manos' argument to be incorrect, with respect not only to 1978 but also to the first half of 1979.

Compared with its competitors, many of which experienced the same winter, Rock Island's earnings performance leaves it next to the bottom of the list for the first half of 1979.

Table XV shows the earnings of the Western District railroads, as well as the Illinois Central, the Norfolk & Western and the Elgin Joliet & Eastern (railroads which compete in the Western District but are not classified as Western District railroads).

TABLE XV

EARNINGS
First Half 1979
(in millions of dollars)

BN	109.0
N&W	100.8
UP	81.1
ATSF	61.3
SP	60.0
MP	53.3
SSW	25.6
DRGW	13.9
EJ&E	11.8
C&S	10.1
KCS	9.0
SLSF	8.0
Soo	7.8
FWD	7.2
DMIR	3.2
MKT	(0.4)
ICG	(8.4)
CNW	(38.1)
RI	(45.0)
CMSt.P	(59.1)

Source: ICC RE&I

The Rock Island's performance ranks ahead only of the seriously troubled bankrupt Milwaukee.

Reading the Trustee's Report, one is left (surface wise) with the impression that 1978 was a banner year for the Rock Island.

But how does it compare with its competitors in earnings? It was second to last, ahead only of the Milwaukee, as Table XVI shows:

TABLE XVI

NET INCOME (LOSS) 1978

(in millions of dollars)

N&W	165.2
UP	141.8
BN	113.6
MP	101.9
ATSF	92.5
SP	55.9
SSW	32.9
DRGW	24.5
Soo	23.3
SLSF	20.6
EJ&E	15.0
KCS	14.4
DMIR	6.3
FWD	5.8
WP*	5.5
C&S	3.4
MKT	2.4
ICG	(2.0)
CNW	(15.9)
RI	(21.2)
CMSt.P	(65.2)

Source: ICC RE&I

* Excludes extraordinary item of $115,561,000.

In short, the Trustee can find no solace in a comparison of his net losses with the performance of other railroads.

(3) Comparison with Trustee's forecasts.

The Trustee's Report attempts to impeach the FRA study of the Rock Island because it predicted $29.5 million in Rock Island losses in 1978 and actual losses were only $18 million. Trustee's Report, p.5.

What the Trustee overlooks is that had he paid the national wage scale retroactive to January 1, 1978, as did all other railroads, the Trustee would have incurred $6-8 million in additional operating expenses because of increased labor costs. In addition, the FRA study assumed normalized maintenance expenditures for the Rock Island. The Rock Island, however, was dramatically undermaintained in 1978.[1] Allowing for these variables the FRA study was quite accurate. As for 1979, net losses predicted by the FRA will understate actual Rock Island losses by many millions of dollars.

If stones are to be cast at forecasters, the Trustee's own glass house is extremely vulnerable. We need only recall the following statements of the President of the Rock Island, Mr. Ingram, solemnly presented under oath to the Court and creditors to justify the borrowing of millions of dollars at the expense of creditors:

> "Good marketing will add $150 million to the net income of the railroad over a three-year development period. The annual rate of improvement at the end of the third year should be between $60 and $70 million." (Emphasis added.) Direct Testimony of Trustee's Witness John W. Ingram, p. 2 of Direct Testimony of Trustee's Petition for Authority to Issue Trustee's Certificates (Oct. 15, 1975) (hereinafter "ERSA Testimony").
>
> "John D. Mitros has been hired to eliminate

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[1] See pages 41 - 49, infra.

> surplus personnel and tighten management practices. Good progress has been made in this area. It will add an estimated $50 million annually to the net income of the railroad after a three-year program of improvement." Id. at 2.
>
> "As we make further progress we will, in a reasonably short period of time, be fully viable even at current economic levels." Id. at 4.
>
> "Revenues will increase more quickly than expenses and the ability of Rock Island to internally generate capital will be substantially greater than it has been since the 1950's." Id. at 4.

In 1976-77, the Trustee and his staff submitted forecasts to the FRA and the creditors in support of a proposed capital budget of $160 million. Those forecasts proved so unreliable that even the Trustee's own personnel found them incredible and they were withdrawn within months after they were submitted.

The Trustee's most recent forecast of earnings, submitted at the end of 1977 to the FRA and creditors, Base Case I, is likewise already obsolete.

An analysis of Base Case I underscores the unreliability and excessive optimism of the Trustee's forecasts. This forecast is the third and latest generated by the Trustee; each successive forecast revised downward traffic and hence revenues. Table XVII compares the Trustee's forecast in Base Case I with actual results.

TABLE XVII

ACTUAL vs. FORECASTED INCOME STATEMENT 1978

(in thousands of dollars)

	Forecasted	Actual	Difference	Favorable (Unfav.) Percentage
Total Revenues	416,685	391,616	(25,069)	(6.0)
Operating Expenses	318,367	315,183	3,184	1.0
Net Revenue	98,318	76,433	(21,885)	(22.2)
Tax Accruals	5,294	4,726	568	10.7
Rents	64,321	66,209	(1,888)	(2.9)
Net Railway Operating Income	28,703	5,498	(23,205)	(80.8)
Engineering and Mechanical Programs	32,532	34,493	(1,961)	(6.5)
Net Income (Loss)	306	(21,162)	(21,468)	(infinite)

Table XVII reveals that while revenues fell short of prediction by $25.1 million or 6%, operating expenses were only $3.2 million or one percent less than predicted. This largely contributed to a net railway operating income[2]

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[2] The Trustee's management income statement excludes from operating expense "programs" for mechanical and engineering expenses which normally would be included as operating expenses.

shortfall of $23.2 million or 80.8% and a net income shortfall of $21.5 million. The slight profit projected became a huge loss. Moreover, these significant shortfalls in actual earnings occurred in the twelve months immediately following the month in which the forecasts were presented, further impeaching the credibility of the Trustee's entire forecasting process.

In summary, then, we find that Mr. Manos' predictions of an upturn in the earning power of the Rock Island, as with his predictions concerning carloadings, have proven completely mistaken. Since the fall of 1978, the Rock Island's record of net losses is an unmitigated catastrophe.

Since September, 1978, when Mr. Manos made his prediction that the Rock Island had "turned the corner," the Trustee has reported net losses totalling $51.5 million on an ICC basis and $49.8 million on the Trustee's own depreciation accounting basis. The breakeven months of the summer and early fall of 1978 have proven to be not only a "flash in the pan" but the "calm before the storm."

The Trustee thus has failed to rebut the presumption established by the creditors at the September 18, 1978 status report that the Rock Island is not reorganizable on a traditional income or other basis.

The Trustee's poor track maintenance performance has resulted in more frequent accidents and higher loss and damage claims. An FRA study of accident frequency, released in late 1978 for the year 1977, revealed the Rock Island was the most accident prone railroad in the nation.

Comparing the Rock Island's loss and damage ratio with those of its competitors also is an indication of the Rock Island's poor track condition. Based on first quarter 1979 loss and damage reports to the Interstate Commerce Commission, the Rock Island had the fourth highest loss and damage ratio of the twenty-one railroads competing in the Midwest.

The Trustee's inadequate maintenance spells additional trouble over the long term. Each year that normalized maintenance levels are not achieved, the railroad sinks into a more advanced state of deterioration, creating a further drain on already inadequate resources.

D. NET WORKING CAPITAL

One of the indicators of the state of health of a business is its net working capital position. Net working capital is the difference between short term assets and short term liabilities and other liabilities coming due within the year. It is a reliable indicator which shows whether the business is able to operate without

resort to hand to mouth practices, juggling payables, and straining to meet current expenses by running down current assets and building up current liabilities.

During the course of the Trustee's administration, the working capital position of the railroad has deteriorated steadily, significantly and alarmingly. Table XXIII traces the changes in the Rock Island's working capital position from December 31, 1973 through June 30, 1979.

TABLE XXIII

NET WORKING CAPITAL 1973-1979
(in millions of dollars)

	Net Working Capital (Deficit)
December 31, 1973	(25.8)
December 31, 1974	(26.0)
March 16, 1975	20.2
December 31, 1975	16.6
December 31, 1976	7.8
December 31, 1977	(9.7)
December 31, 1978	(26.2)
January 31, 1979	(33.1)
February 28, 1979	(41.4)
March 31, 1979	(48.0)
April 30, 1979	(50.4)
May 31, 1979	(52.4)
June 30, 1979	(52.2)

From 1973 to 1974, the railroad's working capital deteriorated in the amount of $250,000. Because of the reclassification of current liabilities to deferred liabilities as a result of the filing of the reorganization petition, the working capital position of the railroad improved by $46.2 million between December 31, 1974 and

March 17, 1975. The Trustee was thus able to start his trusteeship with a substantial positive net working capital position of $20.2 million. Unfortunately, from March 17, 1975 to December 31, 1975, net working capital decreased by $3.7 million at a rate of 14.6 times that of 1974. During 1976 working capital deteriorated by $8.8 million or at a rate of 35 times the rate of deterioration of 1974. After December 31, 1976, net working capital dropped by $17.5 million, turning a positive $7.8 million to a deficit of $9.7 million. In 1978, the net working capital deficit increased by $16.5 million to $26.2 million, although part of the additional deficit resulted from capitalization of financing leases in accordance with newly adopted accounting procedures.

Despite the influx of millions in Federal funding, the Rock Island net working capital deficit doubled in the first six months of 1979. The deficit increased from an already huge $26.2 million to an incredible $52.2 million. It is little wonder that the Trustee's cash reserves are all but depleted in mid-summer, traditionally the Rock Island's most prosperous season of the year.

The Rock Island net working capital deficit even exceeds that of the bankrupt Milwaukee Road. At the end of the first quarter of 1979, the Milwaukee's net working capital deficit stood at $32.1 million compared to the Rock Island's deficit of $48.3 million, a difference of

$16.2 million. Similarly, the Rock Island's increase in its net working capital deficit rivaled that of the Milwaukee for the 12-month period ending March 31, 1979. The Rock Island's deficit increased by $33.8 million, the Milwaukee's by $33.4 million, while the net working capital of 17 Western District railroads (including the Rock Island and the Milwaukee), and the N & W, EJE and ICG decreased on the average by only $4.25 million.

E. DETERIORATION IN CASH RESERVES

Rivaling its deterioration in net working capital is the Rock Island's deterioration in its cash reserves. For the first time in these proceedings, the Trustee's ability to meet his payroll became sufficiently in doubt that he sought authority to invade the escrow funds in late March of this year. Just when creditors were beginning to feel relieved because the authority was not exercised, the Trustee made a second request on June 27, 1979 for authority to invade the escrow funds to meet the end of the month payroll. This request was not made during a severe winter or spring flooding. It came in late June when traffic flows should have been normalized and cash flows restored.

This second cash request, more than any other factor, demonstrates how close the Trustee, the creditors and shareholders, not to mention the public interest, are to the precipice. Indeed, the Rock Island is alive

and gasping today not because of any ability to generate capital on its own, but by reason of RTA, shipper, State, ERSA, §505 and §511 4-R Act funding, the deferral of fixed and prepetition charges under §77 of the Bankruptcy Act, and the payment of substandard union wage scales.

Creditors were amazed to learn in discussions with the Trustee's staff on the car leasing program on April 9, 1979 that the Rock Island, presumably for reasons of cash conservation, was not spending any of its internally generated funds in 1978 to repair rolling stock either before or after it received funding under the $33 million FRA §511 car repair program. Instead, the Rock Island was relying solely on shipper sponsorship funds. Little wonder that the Rock Island has maintained a huge inventory of bad order cars during the last several years.

Similarly, the creditors also discovered that the Trustee's increasingly poor cash and net working capital position has severely further constrained the Trustee's minimal track maintenance projects, as noted above. In 1978, much of the limited rehabilitation work the Rock Island undertook was funded by the RTA, the State of Iowa and Iowa shippers. For example, of the 43.21 miles of new rail laid, 16.74 miles of it, or more than 38%, was RTA funded. Much of the remaining rail laid represented repair of northwest Iowa branch lines funded by interest-free loans from shippers and the State of Iowa.

We also note with extreme concern the Trustee's claim that he may be unable to fund for lack of cash the single most important planning project of his Trusteeship, i.e., the retention of an independent consultant to conduct a thorough study of the Rock Island's reorganization propsects and viability. Statements by Trustee's counsel in this regard are astounding because all that is involved is the rendition of 4,600 man hours of service by existing personnel and possibly the hiring of one or two additional employees. The total cost to the Rock Island should approximate only $100,000.00 (4600 man hours of Rock Island personnel x $20.00/hour).

Table XXIV below shows the Trustee's deteriorating cash position:

TABLE XXIV

ROCK ISLAND CASH AND SHORT TERM INVESTMENTS
(in millions of dollars)

Date	Amount
December 31, 1974	$ 3.6
March 17, 1975	6.8
December 31, 1975	20.8
December 31, 1976	19.6
December 31, 1977	16.4
December 31, 1978	16.6
January 31, 1979	12.0
February 28, 1979	4.6
March 31, 1979	4.6
April 30, 1979	3.2
May 31, 1979	3.9
June 30, 1979	3.0

Source: ICC CBS Reports and RI General Balance Sheets.

Table XXIV is deeply disturbing because the depletion of the Trustee's cash reserves has occurred in what is traditionally the Rock Island's most prosperous season of the year. As a result, the Trustee will enter the winter months of 1979 with no reserve of cash and the most unfavorable working capital deficit in its entire history.

If the Rock Island is afflicted by either (i) another severe winter, (ii) an economic recession of any significance at all or (iii) a crippling strike,[3] it will clearly not survive another year absent massive federal financial assistance supplied, if at all, at the expense of the creditors and the erosion of their security.

III. THE NATURE OF SECTION 77

The symptoms of the critical illness that afflicts the Rock Island are painfully obvious, as we have just seen: depressed carloadings, massive losses and erosion of the Debtor's estate, inadequate maintenance,

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[3] Unfortunately, a strike is now in progress.

APPENDIX I

INTERSTATE COMMERCE COMMISSION ABANDONMENT DECISION

May 23, 1980

EC

INTERSTATE COMMERCE COMMISSION

Report

Docket No.AB-46(Sub-No.22)

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR
(WILLIAM M. GIBBONS, TRUSTEE)-ABANDONMENT-ENTIRE SYSTEM

Decided: May 23, 1980

Recommendation made to the Reorganization Court that the Trustee of the Chicago, Rock Island and Pacific Railroad Company be permitted to abandon all lines and discontinue all operations. We further recommend that the Court withold abandonment and discontinuance authority for the lines involved in Finance Docket No. 28799 (Sub-No. 1), St. Louis Southwestern Railway Company-Purchase (Portion)-William M. Gibbons, Trustee of the Property of Chicago, Rock Island and Pacific Railroad Company, Debtor Between Santa Rosa, NM and St. Louis, MO, until the Commission issues a final decision. We also recommend that the Reorganization Court require the Trustee, at a reasonable price to offer the lines in appendix D for acquisition for continued rail service. Other conditions are also recommended.

Martin L. Cassell, Nicholas G. Manos, and Don McDevitt for applicant Chicago, Rock Island and Pacific Railroad Company, Debtor (William M. Gibbons, Trustee).

James E. Armstrong and Dellon E. Coker for the United States Depart of Defense.

Mark G. Aron, Diane R. Liff, Cleveland Thornton, and Ray Velarde for the United States Department of Transportation.

T. Scott Bannister for the Iowa Department of Transportation, Transportation Regulation Board.

Tom L. Green and Robert T. Stephan for the State of Kansas.

Richard P. Braun for the Minnesota Department of Transportation.

Floyd W. Taylor for the Oklahoma Department of Transportation.

Owen T. Kinney for the Railroad Commission of Texas.

Frederick J. Griffin for the Panhandle Regional Planning Commission.

Marvin V. Butler for the City of Manhattan, KS.

Harlin Owens and Larry Haugen for the City of Worthington, MN and Worthington Industries, Inc.

Harold C. Kaplan, Terry F. Moritz, and Daniel R. Murray for certain creditors.

James J. Irlandi for SRI Inc.

Carl M. Gaass for the Altoona-Pella Shippers Association.

John D. Heffner for the Keokuk Northern Real Estate Company.

Wayne Bevis for Rolscreen Company.

G. D. Kelly for Sun Oil Company of Pennsylvania.

Thomas P. McFarland, Jr. for Williamette Industries, Inc.

Stuart Gassner for the Chicago and North Western Transportation Company.

Michael E. Roper and W. A. Thie for the Missouri-Kansas-Texas Railroad Company.

John S. Shannon, Donald M. Tolmie, and William C. Wooldridge for the Norfolk and Western Railway Company.

John O'B. Clarke, Jr. for the Railway Labor Executives' Association.

REPORT

The Chicago, Rock Island and Pacific Railroad Company, Debtor (William M. Gibbons, Trustee) (Rock Island) filed an application[1/] on April 24, 1980 to abandon all lines and discontinue all operations over its entire 10,468 mile system. Rock Island is a common carrier by railroad subject

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1/ No fee accompanied this application. Normally we require a $700 fee with an abandonment application. See 49 CFR §1002.2(d)(17). Because of the financial condition of the Rock Island, as documented in this report, we will waive payment of the fee.

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to subchapter I of chapter 105 of title 49, United States Code.

An expedited proceeding has been conducted under the ICC's regulations entitled Abandonment of Railroad Lines and Discontinuance of Service, 49 CFR Part 1121 (1979) Subpart F, Abandonment Procedures for Bankrupt Railroads, 44 Fed. Reg. 73105 (December 17, 1979) (Abandonment Procedures). Under these procedures, as modified, comments on the proposed abandonment were required to be filed in the form of sworn statements by May 5, 1980. We have also accepted, and considered any late filed comments.

Section 17(a) of the Milwaukee Railroad restructuring Act, Pub. L. No. 96-101, 93 Stat. 736 (1979) (MRRA), has transferred ultimate jurisdiction over Rock Island abandonments from the Commission to the United States District Court for the Northern District of Illinois, Eastern Division (Bankruptcy Court), the Honorable Frank J. McGarr presiding -- the same Court that has jurisdicton over the Rock Island reorganization/liquidation, pursuant to section 1170 of the Bankrupty Code, 11 U.S.C. §1170. The Bankruptcy Court entered Order No. 232 (contained in Appendix H) on April 14, 1980 directing the Commission to present its report in this proceeding no later than 30 days after the Rock Island filed its abandonment and discontinuance application, which is May 24, 1980. The instant report contains our recommendations on the abandonment and discontinuance request.

CONCLUSIONS

We conclude that abandonment of the Rock Island and its dissolution as an operating railroad is required by the public convenience and necessity. We have reviewed the carriers present financial position and future prospects and

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conclude that it has no realistic hope for reorganization or continued public service in its present form. The extremely deteriorated condition of its plant and severe erosion of its traffic base (through interrupted and uncertain operations) make it clear that the Rock Island will not be able to recover. Consequently, fairness to its creditors and stockholders dictates that the carrier be liquidated. Nevertheless, the communities and shippers served by the Rock Island have also shown that many of its services are essential and can be profitable. We recommend to the Court that, in permitting abandonment, it take steps to insure that the service over the viable portions of the Rock Island is not interrupted and that these portions are sold as operating lines. This will not only avoid interruption in service, but insure that the affected roadbeds and facilities are not allowed to deteriorate further through disuse or neglect. In many cases applications for the purchase of these segments or negotiations aimed at purchase are already underway, and the lines are being operated by other carriers. We would also include any other segments that attract bona fide offers. We think this resolution--total abandonment with minimum service interruption--is fair to all concerns.

PARTIES

Comments on the Rock Island abandonment application were filed by the Department of Defense (DOD), Department of Transportation (DOT), Iowa Department of Transportation, Transportation Regulation Board (IA-DOT), State of Kansas (Kansas), Minnesota Department of Transportation (MN-DOT), Oklahoma Department of Transportation (OK-DOT), Railroad Commission of Texas (RR-TX), Panhandle Regional Planning

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Commission (Panhandle), City of Manhattan, KS (Manhattan), City of Worthington and Worthington Industries, Inc. (Worthington), Continental Illinois National Bank and Trust Company (Continental), The First National Bank of Chicago (First National), Henry Crown, et al. (Crown), SRI Inc. (SRI), Altoona-Pella Shippers Association (APSA), Keokuk Northern Real Estate Company (Keokuk), Rolscreen Company (Rolscreen), Sun Oil Company of Pennsylvania (Sun Oil), Williamette Industries, Inc. (Williamette), Chicago and Northwestern Transportation Company (C&NW), Missouri-Kansas-Texas Railroad Company (Katy), Norfolk and Western Railway Company (N&W), and Railway Labor Executives' Association (RLEA).

MOTION TO REJECT

The Railway Labor Executives' Association (RLEA) joined by Williamette Industries, Inc., filed a motion to reject Rock Island's application on May 5, 1980, alleging that: (1) the application does not comply with the Abandonment Procedures; and as a result of this (2) there is insufficient information for the Commission to evaluate the application.

Technically RLEA is correct that Rock Island's application does not comply completely with the Abandonment Procedures. However, in light of the Court's order requiring Rock Island to file an application on 10 days notice, and considering Rock Island's poor financial condition, we will not require technical compliance with our Abandonment Procedures in this instance. While the application itself may not contain sufficientinformation we have obtained information needed to prepare a reasoned report by taking official notice of numerous publicly available documents

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dealing with the Rock Island. We do not believe that RLEA has shown the likelihood of any real prejudice arising from the use of the Commission's publicly available information on the financial and operational state of the Rock Island. We will therefore deny RLEA's motion to reject because of this proceeding's unique circumstances.

HISTORY OF THE ROCK ISLAND

The Rock Island and its predecessor companies have basically existed as granger railroads since 1847; however, the purposes of this report are best served by focusing on Rock Island's recent history.

On March 17, 1975, Rock Island sought protection and began bankruptcy proceedings under Section 77 of the Federal Bankruptcy Act. We found Rock Island cashless on September 26, 1979 and ordered the Kansas City Terminal Railway Company (KCT) to provide directed service, at government expense, over the Rock Island routes. See Kansas City Term. Ry. Co.-Operate - Chicago, R.I.& P., 360 I.C.C. 289 (1979). This ended on March 23, 1980. Currently, directed service over portions of Rock Island is being carried on by a number of carriers on an uncompensated basis.[2/] However, on May 31, 1980, this too will end.

2/ See Directed Service Order No. 1437, Regional Transportation Authority - Directed Service - Chicago, Rock Island & Pacific Railroad Company, Debtor (William M. Gibbons, Trustee) over Chicago Commuter Line (not printed) decided March 20, 1980, 45 Fed. Reg. 21841; Directed Service Order No. 1453, St. Louis Southwestern Railway Company-Directed Service-Chicago, Rock Island & Pacific Railroad Company, Debtor (William M. Gibbons, Trustee) between Santa Rosa, NM and St. Louis, MO (not printed) decided March 21, 1980, 45 Fed. Reg. 21843; Directed Service Order No. 1456, St. Louis Southwestern Railway Company - Directed Service - Chicago, Rock Island & Pacific Railroad Company, Debtor (William M. Gibbons, Trustee) between Memphis, TN, and Forrest, AR (not printed) decided March 24, 1980, 45 Fed. Reg. 21839; and Directed Service Order No. 1462, Various Railroads-Directed Service - Chicago, Rock Island & Pacific Railroad Company, Debtor (William M. Gibbons, Trustee) (not printed) decided March 28, 1980, 45 Fed. Reg. 22943.

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The Rock Island filed a plan of reorganization on December 28, 1979, which was rejected by the Bankrupty Court on January 25, 1980. It was stated that continuation of the Rock Island on an income producing basis, whether in core, in whole, or in part is just not possible. Judge McCarr then entered Order No. 229 requiring the filing of a plan by Rock Island to liquidate assets by July 17, 1980.

DESCRIPTION OF THE ROCK ISLAND

Rock Island operated in the 13 states of Arkansas, Colorado, Illinois, Iowa, Kansas, Louisiana, Minnesota, Missouri, Nebraska, New Mexico, Oklahoma, Tennessee, and Texas. Its main routes are between Chicago and Tucumcari, NM, via Kansas City; St. Louis and Tucumcari via Kansas City; Memphis and Tucumcari via Little Rock, Oklahoma City, and Amarillo; Chicago and Denver via Council Bluffs and Omaha; St. Louis and Denver via Kansas City; the Twin Cities and Galveston via Des Moines, Kansas City, Fort Worth, Dallas, and Houston; and Chicago and both Minneapolis and Galveston.

The 10,468 mile system consists of 8,139 miles of main track and 2,329 miles of branch line. Included in the Rock Island system are 762.20 miles of trackage rights over numerous carriers (detailed in Appendix E). The following table indicates the Federal Railroad Administration (FRA) track class (49 CFR §213.9) of main lines as of May 1979.

TABLE 1

FRA Class	Maximum Speed (miles per hour)	Number of Miles	% of Total
IV	50	208.1	3.3
III	40	2090.7	33.3
II	25	1857.8	29.4
I	10	2169.4	34.3
Total	-	6326.0	100.0

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FRA inspected the portions of the Rock Island operated under directed service as of February 15, 1980, and found the following FRA track classes on main lines.

TABLE 2

FRA Class	Maximum Speed (Miles per hour)	Number of Miles	% of Total
III & IV	40 or 50	1829.5	33.7
II	25	1863.2	34.3
I	10	1322.8	24.3
less than I	less than 10	420.8	7.7
Total	-	5436.3	100.0

Rock Island has also requested authority to abandon its subsidiary railroad companies that are an integral part of its system. They are the Galveston Terminal Ry. Co. (equal ownership with Burlington Northern, Inc.) (Galveston Terminal); the Oklahoma City Junction Railway Company (equal ownership with the Atchison, Topeka and Santa Fe Railway Company) (Oklanoma City Jct.); the Peoria & Bureau Valley Railroad Company (96.7% ownership); the Peoria Terminal Company (100%); and Pullman Railroad Company (100%).

The Rock Island principally provides freight service,operating only one commuter passenger service line. As of July 25, 1979, it operated a total of 142 trains over the system, mostly daily trains. It had 383 road diesel locomotive units in service on July 26, 1978, and 347 on July 25, 1979. The number of freight cars owned and leased totaled 25,139.

The only passenger line operated by the Rock Island is the Chicago-Joliet, IL commuter line. Approximately 40,000 daily riders rely on the commuter service. It is estimated that cessation of this service would result in the

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consumption of 4.5 to 5 million additional gallons of gasoline per year by substituted automobile traffic. We found an urgent need for continued service on this line and on March 20, 1980, permitted the Illinois Regional Transportation Authority (RTA) to provide service as a "directed rail carrier", without Federal subsidization under Directed Service Order No. 1437, supra.

REVENUES AND EXPENSES

The Rock Island's financial condition is bleak. While the carrier's total railway operating revenues have increased yearly since 1968 (with the exception of 1975), expenses have increased more rapidly and the operating ratio has ranged from a low of 79.6 in 1971 to a high of 85.1 percent in 1977. (The figures for 1978 are not comparable because of accounting changes.) In addition, the increasing revenues reflect price increases and mask a steady decline in traffic. See Appendix C.

Net railway operating income was negative for the years 1968 through 1978. These losses have increased from $6.5 million in 1968 to $38.5 million in 1977. In addition, for the period 1968 through 1977, Rock Island has had negative working capital in all years except 1973 and 1976. See Appendix B. The positive working capital for those two years is attributed to increases in temporary cash investments, decline in accounts and wages payable, and accrued tax liability. When Rock Island filed for protection under Section 77 of the Federal Bankruptcy Act it was allowed to defer interest and principal payments on its debt, thereby bolstering its cash position.

The Rock Island's rate of return has been negative in all the years under study, and the substantial net losses every year have resulted in a decrease in the amount of stockholders' equity.

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Long-term debt due within one year has remained somewhat constant, decreasing only slightly with the exception of 1978. The increase in 1978 is attributed to an accounting change. The carrier's long term debt due after one year increased drastically in 1978, but this again is due to an accounting change.

The stockholders' equity has been shrinking since 1968, and this, combined with the carrier's increasing level of debt, has resulted in a rapidly increasing debt-equity ratio. During the period 1968 to 1974 the percentage remained fairly constant (between 30.8 percent and 34.2 percent). However, the ratio rose to 38 percent in 1975, 43.7 percent in 1976, and 51.7 percent in 1977. Without positive earnings in the future, this trend will continue. The Rock Island has been consistently unable to meet its fixed charges payments because no income was available.

MAINTENANCE COSTS

In July 1979, FRA conducted an inspection of approximately 52 percent of the main track of the Rock Island. The purpose of this 3,992 mile inspection was to determine the general condition of the track structure and assess Rock Island's ability to maintain its facility in compliance with Federal regulations. The mileage inspected was not limited to a single area, and track in each Rock Island division was included in this survey.

Many serious problems were revealed. Of the miles inspected, 1,934 or 48.4 percent did not comply with the requirements for the posted speed. Of greater concern to FRA was the fact that 24 percent (957 miles) did not comply with the standards for Class I. A copy of this FRA Track Assessment Report is attached as Appendix I.

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The condition of Rock Island's ties was the area of greatest concern in the FRA inspection report. Estimates reveal that it will require over 428,000 ties to bring the surveyed track into compliance with Class I. To bring the track into compliance with the timetable speeds, it is estimated that 2,395,000 ties are needed. Rock Island also has serious rail problems with an estimated 44,000 rails (of 39 foot long rail) needed to bring the track into compliance with FRA requirements.

Rock Island has reported: defered maintenance-road on the line $213.7 million, defered maintenance-equipment $20.8 million, delayed capital improvements-roads $82.7 million, and delayed capital improvements-equipment $77.9 million.

In summary, Rock Island has an immediate need for substantial rehabilitation throughout its system, but it cannot meet this need because of its steadily declining revenue base and severe financial problems.

EFFECT ON SHIPPERS AND COMMUNITIES

In October and November 1979, we held 24 days of public hearings in 17 cities throughout the Midwest to determine the need for continued directed service over the Rock Island. The Rail Services Planning Office (RSPO) prepared a report from the hearing transcripts and written statements which were submitted at these hearings. RSPO concluded that the public consistently deemed Rock Island's services essential for the following reasons:

(1) captive shippers;

(2) higher transportation costs by truck;

(3) infeasible truck transportation because of rail dependent commodities, inaccessibility to highways, weight limitations, and poor road conditions;

(4) shutdowns or relocations of businesses would result from a cessation of service;

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(5) full grain elevators; and (I-12)

(6) a need to preserve competition.

At a number of the hearings, witnesses emphasized that the Rock Island was critical to the movement of the Nation's grain since in 1978 it moved 10 percent of the Nation's western grain.

During the strike by Rock Island employees, (August-October 1979), shippers had to try to find alternate transportation. Impacts on shippers from the strike included: no service and consequent shut downs; employee lay-offs; depletion of existing inventories; increased grain storage; discounted prices on products sold; and higher transportation charges (if alternate transportation was available). These same impacts will result if the entire Rock Island system is abandoned without some provision for continued service.

We recognize the adverse effects which abandonment would have on shippers, communities, and the local public. In making our recommendations, we must consider the burden which future operations would have on the Rock Island. We must also keep in mind that it is highly unlikely Rock Island will be able to start up operations which have been discontinued since August 1979.

EFFECT ON EMPLOYEES

Abandonment of the Rock Island would also harm local economies due to the multiplier effect of losing the railroad employees' salaries. The number of employees was 8,675 prior to the strike, while KCT employed 8,270 during directed service. The number of Rock Island employees now working is unknown, while those that will be working after abandonment and acquisition cannot even be estimated (see Appendix J).

NATIONAL DEFENSE

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DOD concerned itself with the impact of a cessation of Rock Island service on defense installations at the Twin Cities Army Ammunition Plant, MN; Fort Sill, OK; Houston Port, TX; McAlester Army Ammunition Plant, OK; McConnel Air Force Base, KS; and Rock Island Arsenal, IL. Rail service to these facilities is considered necessary for their efficient operation in peacetime, and essential during mobilization periods. All installations but the Rock Island Arsenal have alternate rail transportation. Service to the Rock Island Arsenal will be discussed later.

ABANDONMENT CRITERIA

The application to abandon its entire line and trackage rights, and to discontinue operations, submitted to this Commission by the Rock Island is governed by the criteria of 49 U.S.C. §10903. Section 17(a) of the MRRA transferred jurisdiction over Rock Island abandonments from this Commission to the Bankruptcy Court which has jurisdiction over the proposed termination of all railroad operations by Rock Island.

We are submitting our recommendation to the Court pursuant to Section 17(b)(2) of the MRRA and 11 U.S.C. §1170. Our role under 11 U.S.C. §1170 is that of an advisor since the Bankruptcy Court has the final authority over the abandonment of lines of bankrupt railroads pursuant to the Bankruptcy Code.

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Section 19 of the MRRA removes from consideration in bankrupt railroad abandonment proceedings, the National Environmental Policy Act.

Our duty under 49 U.S.C. §10903 is to determine whether the public convenience and necessity warrant abandonment. In making this determination, we must weigh the hardships the abandonment will impose upon the shippers and communities involved, against the present and future burden which would be imposed on the railroad and interstate commerce by continued operations. Colorado v. United States, 271 U.S. 153 (1926).

DISCUSSION

General. The abandonment of an entire rail system the size of the Rock Island requires a weighing of national defense, energy conservation, and rural and community development as well as economic consequences such

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as lack of rail service, unemployment, and higher shipping charges in light of the burden of continued Rock Island operations on interstate commerce and the rights of Rock Island's creditors. By adopting our recommendations, the Bankruptcy Court can achieve an equitable balance of these factors.

Our weighing of the evidence in this proceeding convinces us that highly persuasive arguments in favor of Rock Island's abandonment come from its physical (a deteriorated plant requiring hundreds of millions of dollars to upgrade) and fiscal condition (staggering losses for over a decade). Counter arguments of need for continued service and employee impact over the entire system that have been made are not as persuasive. With regard to the entire system, Rock Island's creditors (Continental, First National, Crown, and SRI) support abandonment, while RLEA opposes the abandonment on the grounds that cashlessness is a transitory phenomenon.

Rock Island's cashlessness of September 1979 was the result of an arduous and painful erosion of its traffic base and facilities. Its current financial condition suffers from the same malaise, with a huge retained earnings deficit. In our judgment, this situation will not change and, as a corporate entity and a railroad the Rock Island has failed. We would not require this entity to continue to provide services, or even exist. However, we would make provision for the continuation of essential services.

Valuation. Essential services can be maintained through the sale of rail lines to either existing railroads or new railroads. These sales must be the result of arms-length negotiation. The Trustee has a fiduiary duty to maximize the assets of the estate for the benefit of

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creditors, while the purchasers cannot be expected to invest in a line at a price above which they can earn a reasonable return. We raise this issue in light of the paucity of contracts to sell entered by the Trustee, and the position taken in this proceeding by N&W. (I-16)

N&W as a party negotiating to buy a line, indicates that Rock Island has insisted on a price related to the gross freight revenues produced by a rail line. We do not think this is reasonable. It fails to take into account the properties' condition or the traffic which must be recovered. On the other side of the coin, N&W suggests that the Trustee be satisfied with the net liquidation value of the segment. Although this method of valuation is more appealing, it fails to account for whatever value (if any) the property would have as a railroad going concern.

In order for essential rail service to be preserved, the Bankruptcy Court must require the Trustee to negotiate the sale of Rock Island's lines expeditiously and at reasonable prices.

Employee protection. RLEA urges that we recommend employee protection at a level greater than required by New York Dock Ry.-Control-Brooklyn Eastern Dist., 360 I.C.C. 60 (1979). New York Dock protection is apparently mandated by section 17(a) of the MRRA. However, under that section the duty to impose employee protection squarely rests with the Bankruptcy Court. We will make no recommendation, but will point out certain options that the Court has.

The New York Dock conditions can be imposed on the Rock Island. However, another viable option is not to impose any form of labor protection. In past instances where entire rail systems have been abandoned and no company would reap the benefits of the abandonment, we have found the

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imposition of employee protective conditions not to be warranted. See, Wellsville, Addison & Galeton R. Corp.-Abandonment, 354 I.C.C. 744, 746 (1978). Finally, the entire issue of imposing employee protective conditions may be rendered moot shortly by Congressional action.

Individual rail lines. The Rock Island can be broken into 4 major rail line for consideration of the abandonment: (1) the Twin Cities to Galveston; (2) Denver to Chicago; (3) Tucumcari, NM to St. Louis; and (4) Tucumcari, NM to Memphis. We will discuss each line in turn and then make our ultimate recommendations.

(1)Twin Cities--Galveston Line. This 1,414 mile line runs between Minneapolis-St. Paul and Galveston via Des Moines, Kansas City, Wichita, Oklahoma City, Fort Worth, Dallas, and Houston. This line also consists of numerous branch lines in Minnesota, Iowa, Kansas and Oklahoma. The northern portion of the line serves Minnesota, Iowa, and Missouri, while the southern portion serves Kansas, Oklahoma, and Texas.

(a) Northern Segment. MN-DOT filed a comment expressing opposition to the abandonment, unless the lines are operated by another carrier. MN-DOT identifies the Rock Island main line between the Twin Cities and Kansas City as essential to the economy of the State and to the midwest rail system. In particular, MN-DOT is concerned about service to towns which are dependent on the Rock Island for service such as Clarks Grove, Ellendale, and Hope, on the main line, and Worthington on a branch line.

In addition, MN-DOT is concerned that if the Commission recommends granting the abandonment, it will no longer have the authority to order directed interim service, and thus, there would be no service over the involved lines during the

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Other. There are three other matters that this report will cover before making our final recommendations.

Rock Island has requested permission to abandon 5 subsidiaries, two of which are jointly owned with other railroads. Rock Island's subsidiaries which are wholly owned should be abandoned. However, where the subsidiary is jointly owned, as are Galveston Terminal and Oklahoma City Jct., neither we nor the Bankrupt Court can permit their abandonment, since the subsidiary railroads are not considered bankrupt.

Our jurisdiction over abandonment of these railroads can only be effectuated by the filing of an application under 49 U.S.C. §10903. The Bankruptcy Court, on the other hand, has no jurisdiction over the Galveston Terminal or Oklahoma City Jct., since neither is bankrupt or a wholly owned subsidiary of Rock Island. The proper course involving these two railroads is for Rock Island to sell its ownership interest.

It is also appropriate here to advise persons interested in acquiring and operating Rock Island lines of the procedures they must follow. There are two types of lines involved which require different procedures to be followed, those abandoned and those not abandoned.

A line that has been abandoned is no longer a line of railroad as that term is used in section 17(b)(1) of the 4RRA. Therefore, acquisition of that type of line requires an agreement with the Trustee, and approval of the agreement by the Bankruptcy Court. If the buyer wants to operate as a railroad over the acquired line, it must then come to the Commission for a certificate of public convenience and necessity to operate the line. This is governed by 49

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U.S.C. §10901. The regulation regarding the application are found at 49 CFR Part 1120. While an application is pending temporary service may occur under an emergency Service Order from our Railroad Service Board. The Commission's staff is available to anyone with questions or needing advice in this area. (I-19)

For Rock Island lines that are not abandoned, their sale is subject to the requirements of section 17(b) of the MRRA. The procedure to be followed requires an agreement with the Trustee, approved by the Bankruptcy Court. An application must be filed with us complying with 49 CFR Part 1111, Subpart B, Acquisition Procedures for Lines of Railroads in Reorganization, 45 Fed. Reg. 6107 (1980). Upon the filing of this application the Bankruptcy Court may permit the buyer to operate interim service over the line to be purchased. See, Section 17(b)(3) of the MRRA. Again the Commission staff is available to provide assistance.

Were this a normal abandonment proceeding, we would find that because of its poor financial condition, deteriorated physical plant, and eroded traffic base that the present and future public convenience and necessity permit the abandonment of Rock Island's entire system as an entity upon the conditions that it: (1) keep in place and attempt to sell, upon reasonable terms, all lines in Appendix D for continued rail service; (2) keep in place all other lines for which offers have been received prior to the hearing before the Bankruptcy Court; and (3) not abandon any lines for which purchase applications are pending. We base our recommendations on this.

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RECOMMENDATIONS

We recommend the following to the Bankruptcy Court:

1. The Trustee should be authorized to abandon the entire Rock Island system consisting of 10,468 miles including 8,139 miles of main track, 2,329 miles of branch lines, and to discontinue service over 763.20 miles of trackage rights conditioned upon:

(a) Keeping in place and attempting to sell, for a reasonable period of time, upon reasonable terms, all portions of the Rock Island in Appendix D for continued rail service; and

(b) not permitting abandonment of any line for which a purchase application is pending with the Commission.

2. If, by the scheduled date of commencement of Court hearings in this proceeding, a financially responsible person comes before the court and offers to acquire any other of Rock Island's lines sought to be abandoned, the Court should postpone authorizing the abandonment of these lines for which offers had been made for a reasonable time to permit negotiations.

3. The Court should require the Trustee to keep intact the tracks and rail facilities of those lines which are listed in Appendix D or are subject to applications or offers to purchase for a reasonable period of time. The Trustee should be authorized to dispose of those lines which are not subject to offers to purchase.

4. The Court should permit prospective purchasers to provide interim service over the line until sales are consummated.

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By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Stafford, Clapp, Trantum, Alexis, and Gilliam. Commissioner Stafford concurring in part, dissenting in part with a separate expression. Commissioner Alexis absent and not participating.

(SEAL)

AGATHA L. MERGENOVICH
Secretary

COMMISSIONER STAFFORD, concurring in part, dissenting in part:

I agree with the majority's conclusions with one exception, that is the failure to include the Denver-Omaha/Kansas City main line in Appendix D (See page 33.).

If the court agrees that this line is not worthy of being "kept intact" the practical result means the end of rail service to one of this country's greatest grain producing areas. The economic and social consequences to the communities located on the line were well documented at the public hearing we held at Phillipsburg, KS last October. They range from increased costs of at least 25¢ per bushel to the farmer to millions of dollars needed to upgrade highways in order to accommodate the increased truck traffic. In short, there is a serious question as to whether the grain can in fact be moved by truck.

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Supreme Court, U. S.
FILED
DEC 17 1980
MICHAEL RODAK, JR., CLERK

No. 80-415

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant,

v.

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; HENRY CROWN, et al.; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL P. GOLDSCHMIDT, Secretary of Transportation,
Appellees.

On Appeal From The United States District Court For The Northern District Of Illinois, Sitting As A Railroad Reorganization Court

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ISSUES PRESENTED FOR REVIEW

(1) Whether the Rock Island Act's employee protection provisions violate the fifth amendment to the United States Constitution through their uncompensated taking of the private property of the Rock Island estate for a purported public purpose and without due process of law.

(2) Whether the Rock Island Act's employee protection scheme violates the due process, separation of powers and uniformity in bankruptcy provisions of the United States Constitution by its summary taking of the property of the Rock Island estate.

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No. 80-415

IN THE
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RAILWAY LABOR EXECUTIVES' ASSOCIATION,
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Appellees.

On Appeal From The United States District Court For The Northern District Of Illinois, Sitting As A Railroad Reorganization Court

MOTION TO AFFIRM

William M. Gibbons, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Continental Illinois National Bank and Trust Company of Chicago and The First National Bank of Chicago, as Indenture Trustees, and Henry Crown, et al. ("appellees"), pursuant to Rule 16 of the Rules of the Supreme Court of the United States, respectfully request that this Court note probable jurisdiction of this appeal, and affirm the Preliminary Injunction and Declaratory Judgment of the district court on the ground that the decision below was so obviously correct as not to warrant further review.

PRELIMINARY STATEMENT

This is an appeal from the preliminary injunction of Judge Frank J. McGarr, of the United States District Court for the Northern District of Illinois, against the implementation of the employee protection provisions of the Rock Island Transition and Employee Assistance Act, 45 U.S.C. §§ 1001, 1008 (May 30, 1980) ("Rock Island Act"). Those provisions would impose a $75,000,000 expense of administration obligation on the bankrupt Rock Island Railroad estate to fund a wholly new employee protection scheme. On June 9, 1980, the district court found that the Rock Island Act's employee protection scheme would work an unconstitutional taking of the property of the Rock Island estate, its creditors and shareholders, and would deprive them of due process of law in violation of the fifth amendment to the United States Constitution. Judge McGarr therefore enjoined the implementation of the Act to prevent irreparable injury to the estate. The Railway Labor Executives' Association ("RLEA") took this appeal from the district court's order under 28 U.S.C. § 1252, and this Court subsequently denied the appellant's application for a stay of the injunction.[1]

In the Staggers Rail Act of 1980, Pub. L. No. 96-448 (October 14, 1980), Congress reenacted, without substantial change, the very same employee protection scheme, once again to be funded by imposing $75,000,000 in expense of administration obligations on the Rock Island estate. Section 124(c) of the amended statute provides that "nothing in this Act . . . shall limit the right to commence an action . . . under the Tucker Act." The district court denied the motions of the RLEA, the United States and the Interstate Commerce Commission, based upon the Staggers Rail Act amendments, to vacate the June 9, 1980 injunction. Judge McGarr

[1] *Railway Labor Executives' Ass'n* v. *Gibbons* (*In re Chicago, R. I. & P. R.R.*), 100 S. Ct. 2668 (Stevens, Circuit Justice, June 28, 1980) (opinion denying stay application); 100 S. Ct. 3057 (July 2, 1980) (order denying stay application) (No. 80-415).

described the amendments as "cosmetic." App. F, *infra*, at f-2. The RLEA, the United States and the Commission appealed the denial of their motions to vacate to the United States Court of Appeals for the Seventh Circuit.[2]

This appeal is not mooted by the enactment of the Staggers Rail Act amendments or the pendency of the appeals in the court of appeals, as the federal appellees suggest in their response to the RLEA's Jurisdictional Statement dated November 30, 1980. The government's contention assumes that the court of appeals will reverse the determination of Judge McGarr that the "cosmetic" amendments to the Rock Island Act scheme did not alter its fundamental constitutional defects. Because the basic employee protection scheme was not repealed, as the government argues, but was reenacted without substantial change by the Staggers Rail Act, the questions raised in this appeal regarding the constitutionality of the Act's basic employee protection provisions and its imposition of a $75,000,000 cost of administration expense for new labor protection obligations remain ripe for adjudication by this Court.[3]

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[2] *In re Chicago, R. I. & P. R.R.*, Nos. 80-2487 and 80-2536 (7th Cir., *oral argument en banc* Nov. 17, 1980). Under the Staggers Rail Act amendments, the ruling of the court of appeals concerning the appeals pending before it must issue by December 28, 1980.

[3] The appellees submitted to the court of appeals the significant jurisdictional issues raised by the subsequent appeal to that court of an order denying a motion to vacate an order already appealed to this Court under 28 U.S.C. § 1252, in a Motion to Dismiss filed on October 25, 1980. That motion was argued with the merits of the appeals to that court on November 17, 1980, and still pends in that court. In light of the jurisdictional arguments made in that motion, it is unclear whether the Seventh Circuit will accept jurisdiction over those appeals and what questions, if any, it will consider.

The appellees subsequently filed a petition for a writ of certiorari before judgment concerning those appeals, which still pends in this Court. *Gibbons* v. *Railway Labor Executives Ass'n*, No. 80-704 (U.S., *petition for cert. filed* Oct. 30, 1980).

Judge McGarr was clearly correct in his determinations that the Rock Island Act's imposition of a new $75,000,000 labor protection obligation on the bankrupt Rock Island is unconstitutional. The appellees also submit that he was manifestly correct in his later ruling that the oblique reference in the Staggers Rail Act amendments to the Tucker Act had no significant effect on the unconstitutionality of the statute as reenacted.

For these reasons, the appellees respectfully request that this Court note probable jurisdiction of this appeal, and summarily affirm the decision of the district court that the basic Rock Island Act employee protection scheme is unconstitutional.

STATEMENT OF FACTS

The Failure of Reorganization Efforts

Following a decade of devastating losses[4] the Rock Island filed for reorganization under Section 77 of the Bankruptcy Act of 1938, 11 U.S.C. § 205, on March 17, 1975. At Judge McGarr's direction, over the objections of the creditors and shareholders, the Trustee continued rail operations during the ensuing four and one-half years in an effort to preserve rail service pursuant to the public interest objectives of Section 77. Unfortunately, the Rock Island's losses did not abate but accelerated.[5] By the summer of 1979, the Trustee's cash reserves had dwindled to the point where the Trustee could no longer pay his operating expenses.[6]

Despite the Trustee's dire financial straits, the Brotherhood of Railway and Airline Clerks and the United Transportation

[4]The losses totalled $103.4 million. *See* Response of Intervenors' Crown, et al. to Trustee's Report for 1978 and Four Months 1979, at 30 (Sept. 6, 1979) (Supp. App. H-7).

[5]In the period from January 1, 1975 through September 30, 1979, the Rock Island incurred losses in excess of $178.4 million on an Interstate Commerce Commission ("Commission") accounting basis. *Id.*; Income Statement-1979 (Supp. App. G-15).

[6]*Id.*; ICC Directed Service Order No. 1398, Appendix A, 44 F.R. 56,343 at 56352-54 (1979).

Union, represented in these proceedings by the appellant RLEA, struck the Rock Island on August 28, 1979.[7] To end the strike, on September 20, 1979, the President of the United States appointed an Emergency Board pursuant to Section 10 of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, thereby mandating a return to work by the Rock Island employees.[8] Contrary to Judge McGarr's expectations[9], and in defiance of the Presidential order, the Rock Island employees did not return to work.

The strike quickly exhausted the already severely limited cash reserves of the Trustee. On September 26, 1979, the Interstate Commerce Commission ordered the Kansas City Terminal Railway Co. to operate and provide directed service over the lines of the Rock Island, based upon "the specific finding that [the Rock Island's] cash position makes its continuing operation impossible" and that the Rock Island "suffers from the type of 'cashlessness' described in 49 U.S.C. § 11125(a)(1)."[10] Since the date of the initial directed service order, the Rock Island has had no railroad operations.[11]

Liquidation and Abandonment

On January 25, 1980, based upon the Rock Island's long history of continuing losses, the conclusion of the court's own ex-

[7]The striking unions demanded the payment of retroactive wage increases before agreeing to even minimal work rules changes. The Trustee insisted upon the implementation of more efficient work rules and the elimination of costly featherbedding practices before he would (or, indeed, could) pay wage increases. Those wage increases would have cost the Rock Island estate $14 million—sums all sides knew to be unavailable to the Trustee. Report of Emergency Board No. 191 (October 22, 1979) (Supp. App. C).

[8]*Id.*

[9]Transcript of Proceedings, September 21, 1979, at 9-11 (Supp. App. A-4-6).

[10]Directed Service Order No. 1398, *supra* note 6.

[11]Some of the Rock Island's lines have been operated under Commission orders or Commission-sponsored lease arrangements.

pert,[12] and the urgings of the creditors and shareholders and the federal government, Judge McGarr found that "a continuation of the Rock Island on an income producing basis, whether in core or in whole or in part . . . is just not possible. . . ." Transcript of Proceedings, January 25, 1980, at 100. Judge McGarr thereupon ordered his Trustee to plan and commence the liquidation of the Rock Island. *Id.* at 97 (Supp. App. B-6).

The January 25, 1980 decision to liquidate the Rock Island was confirmed by the Commission and the reorganization court in their respective decisions pursuant to Section 1170 of the Bankruptcy Code, 11 U.S.C. § 1170, authorizing the total abandonment of Rock Island lines. On May 27, 1980, the Commission filed an advisory report with the reorganization court in which it concurred in the view that the Rock Island "has no realistic hope for reorganization or continued public service in its present form." *Chicago, Rock Island & Pacific Railroad Co.—Abandonment,* Interstate Commerce Commission Report, Docket AB-46 (Sub-No. 22) (May 27, 1980), at 4 (Supp. App. I-4). The Commission referred to a long line of cases in which it had refused to impose employee protection conditions on total line abandonments, and declined to recommend that the reorganization court impose such conditions on the Rock Island's abandonment. *Id.* at 16-17 (Supp. App. I-16-17).

On precisely the terms recommended by the Commission, on June 2, 1980, Judge McGarr confirmed the total abandonment of all Rock Island lines and service. Judge McGarr found:

> that Rock Island's unconditional discontinuance of service and its total system abandonment is constitutionally mandated and . . . that to force a railroad to continue operations indefinitely at a loss in order that the public may be served is a violation of the Fifth Amendment rights of those who have a security interest in the enterprise. *Brooks-Scanlon Co.* v. *Railroad Commission,* 251 U.S. 396 (1920).

[12]On January 21, 1980, Peat, Marwick, Mitchell & Co., the court's expert, filed its report, which concluded that the Rock Island was not reorganizable even if pared to its most profitable core. Report of Peat, Marwick, Mitchell & Co., at X-1 through X-16 (January 21, 1980).

Judge McGarr also found:

> [C]onsistent with ICC precedent, with the Rock Island's constitutional right to abandon its lines and discontinue its service, and with the equities of the Rock Island situation, no labor protection arrangements may be imposed on the Rock Island estate. . . .

Order No. 248 (June 2, 1980).[13]

The Rock Island Act

Thus, the district court which had presided over the Rock Island's reorganization proceedings for almost five years had concluded that the Rock Island must be liquidated and was therefore entitled to withdraw from the universe of publicly regulated industries without any labor protection conditions. Despite the court's finding, Congress decided to impose upon the Rock Island the cost of a new "protection" scheme for its former employees. Sections 106 and 110 of the Rock Island Transaction and Employee Assistance Act, 45 U.S.C. § 1001, *et seq.*, signed by the President on May 30, 1980, imposed $75,000,000 in new employee protection obligations on the Rock Island estate. App. A, *infra.* Whether the program is funded directly from the assets of the estate or by federally guaranteed loans under Section 110, the Act mandates that the reorganization court accord cost of administration status to the labor protection arrangements imposed by the Interstate Commerce Commission under the statute.

After extensive argument, on June 9, 1980 Judge McGarr found an "exceedingly great" probability that the Act would work an unconstitutional taking of the property of the Rock Island and deprive the Rock Island estate of due process of law in

[13]The RLEA subsequently twice sought a stay of that order from the Seventh Circuit Court of Appeals. On each occasion that court denied RLEA's request. *In re Chicago, R. I. & P. R. R.*, No. 80-1788 (7th Cir. June 19 and Sept. 18, 1980) (unpublished orders denying stay applications).

violation of the fifth amendment to the United States Constitution by its summary imposition of a new $75,000,000 labor protection claim on the Rock Island estate to serve its purported public purposes. Transcript of Proceedings, June 9, 1980, at 81 (App. C, *infra,* at c-6). Accordingly, Judge McGarr enjoined the implementation of the Rock Island Act's labor protection scheme to prevent irreparable injury to the Rock Island estate, to maintain the status quo and to preserve the assets of the estate pending judicial review. On June 11, 1980, the RLEA took this appeal from that order under 28 U.S.C. § 1252.[14]

On June 28, 1980, Justice Stevens, as Circuit Justice for the Seventh Circuit, denied the RLEA's application for a stay of the district court's order and indicated his preliminary agreement with the district court's conclusion as to the unconstitutionality of the Rock Island Act:

> [H]aving read the parties' submissions, I am now of the opinion that Judge McGarr was probably correct in concluding that the Act authorizes an unconstitutional taking of property of the estate. It appears to direct a transfer of $75 million off the top of the estate's assets to the employees. While such a transfer might be permissible in the course of a genuine reorganization, at least as of this moment, I have difficulty perceiving how, in the context of a liquidation, this is anything other than a simple taking of the property of the general creditors, as the trustee argues.

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[14]On June 20, 1980, Judge McGarr heard the motion to reconsider his June 9 order which was filed by the United States and the Interstate Commerce Commission and joined by the RLEA. Judge McGarr denied the motion to reconsider on June 20, 1980.

On June 28, 1980, the United States, the Interstate Commerce Commission and the Secretary of Transportation filed a notice of appeal to this Court under 28 U.S.C. § 1252, of the June 9, 1980 order and the June 20, 1980 denial of the motion to reconsider. *United States* v. *Gibbons,* No. A-185 (U.S., *appeal filed* June 28, 1980). The government did not timely docket its appeal.

The RLEA never filed a notice of appeal of the June 20, 1980 denial of the motion to reconsider, nor did it ever file another notice of appeal of the June 9, 1980 injunction, although it had expressly joined the June 20 motion to reconsider.

RLEA v. *Gibbons, supra* note 1, 100 S. Ct. at 2671. This Court subsequently sustained Justice Stevens' denial of the stay motion. *Id.*, 100 S. Ct. at 3057. On September 15, 1980, the appellant RLEA filed its jurisdictional statement regarding this appeal.

The Staggers Rail Act of 1980

Displeased with these judicial efforts to protect the Rock Island estate, in September 1980, Congress passed amendments to the original Rock Island Act as part of the Staggers Rail Act of 1980, Pub. L. No. 96-448 (October 14, 1980) (App. B, *infra*). As amended by the Staggers Rail Act, the Rock Island Act still provides for the taking of $75,000,000 from the bankrupt Rock Island estate to fund its labor protection scheme, and requires that the program be accorded cost of administration status.[15] Section 124(c), as amended, provides that "nothing in this Act shall limit the right of any party to commence an action under . . . the Tucker Act." Section 124 of the Staggers Rail Act amendments contains extraordinary provisions limiting judicial review.

Based upon these amendments to the original Rock Island Act, on October 7, 1980, the Government, the Commission and the RLEA requested Judge McGarr to vacate his earlier order declaring the Act unconstitutional. On October 15, 1980, after the submission of briefs and oral argument, Judge McGarr refused to vacate his earlier order and ruled that his earlier injunction would remain in effect. He found:

> This court has studied the Staggers Rail Act amendments to the Rock Island Act, has reviewed carefully the arguments of counsel, the documents filed by the various

[15]The period during which the Trustee and labor unions are permitted to "negotiate" an agreement is reduced from ten to five days. Failing a "voluntary" agreement, the time within which the Commission is required to "impose" a labor protection arrangement is reduced from 30 to 15 days. The Staggers Rail Act eliminated Section 106(d)(1) of the original Act, which precluded any judicial stay of a Commission order imposing labor protection under the Act, and the last sentence of Section 106(d)(2) of the original Act, which purported to preclude review by the Supreme Court.

> parties, the ruling of June 9, 1980, and the court's knowledge of these proceedings, and it remains clear that the Rock Island estate continues to be exposed to irreparable injury by the provisions of the Rock Island Act as amended by the Staggers Rail Act. *The Staggers Rail Act does not cure the defects found in the Rock Island Act.* Like its predecessor, the Staggers Rail Act imposes a $75,000,000 cost of administration claim on the Rock Island estate with priority over claims of general creditors and shareholders on the assets of the estate.

(Emphasis supplied.) Order of October 15, 1980, at 3-4, App. G, *infra* at g-3. *See also* Transcript of Proceedings, October 7, 1980, App. F, *infra*, at f-2-3.

Although this appeal from Judge McGarr's June 9 injunction remained pending in this Court, the RLEA appealed from Judge McGarr's denial of its motion to vacate that injunction to the United States Court of Appeals for the Seventh Circuit. On October 29, 1980 the government followed suit.

On November 13, 1980, the court of appeals, sitting *en banc*, heard oral argument on the appeals of the RLEA, the United States and the Interstate Commerce Commission from Judge McGarr's order of October 15, 1980. *In re Chicago, R. I. & P. R.R.*, *supra* note 2. The procedural amendments of the Staggers Rail Act, with which the court of appeals has complied thus far, require that court to render its final decision on those appeals by December 28, 1980.

ARGUMENT

I.

THE DISTRICT COURT'S DETERMINATION THAT THE ROCK ISLAND ACT'S EMPLOYEE PROTECTION PROVISIONS COMMIT A TAKING OF THE ROCK ISLAND ESTATE'S PROPERTY AND DEPRIVATION OF ITS DUE PROCESS RIGHTS IN VIOLATION OF THE FIFTH AMENDMENT WAS MANIFESTLY CORRECT.

Under the terms of Sections 106 and 110 of the Rock Island Act, in its original form and as amended by the Staggers Rail Act, a taking of the property of the Rock Island estate to fund the

Rock Island Act's employee protection scheme must occur, whether funded directly from the assets of the estate or through an enforced federal loan under Section 110. Because the Act accords expense of administration status to these obligations, they will be payable prior to the interests of the estate's shareholders and unsecured creditors, and may be payable prior to the amounts owed to secured creditors and trade creditors with cost of administration status. Without question, as Judge McGarr found, the Act's employee protection scheme would dilute the value of the estate's assets and reduce the amount available to discharge its existing debts by $75,000,000.

A. The Rock Island—A Moribund Railroad Declared Cashless, Abandoned and Unreorganizable—May Not Be Required To Use Its Funds In The Public Interest.

In Section 102 of the Rock Island Act, Congress declared that protection of former Rock Island employees is essential to achieve the public purpose of continued rail operations, which it considers necessary to the economies of the region formerly served by the Rock Island. However, Congress is seeking to achieve this public purpose and support continued rail operations by imposing a $75,000,000 burden on the Rock Island estate.

Railroads may be required to continue operations at a loss for a reasonable period and to suffer diminution in their property values to serve legitimate governmental interests in maintaining the national transportation system. Nevertheless, this permissible governmental interference with private interests is limited by the fifth amendment. *Regional Rail Reorganization Act Cases ("3R Act Cases")*, 419 U.S. 102, 120 (1974).

In *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396, 399 (1920), Justice Holmes stated the governing principle:

> A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage . . . If the plaintiff be taken to have granted to the public an interest in the use of the railroad it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss.

This principle was recently reaffirmed by the Court of Appeals for the Seventh Circuit, which held in connection with the embargo orders and related borrowings by the Milwaukee Road that it is "settled that a railroad that is cashless cannot be required to continue operating to serve the public interest." *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 611 F.2d 662, 669 ("*Milwaukee Embargo*") (7th Cir. 1979).[16] In *In re Central Railroad Company of New Jersey*, 485 F.2d 208, 213 (3d Cir. 1973), *cert. denied*, 414 U.S. 1131 (1974), the court of appeals stated "the basic principle that an owner of property retains the right ultimately to withdraw that property from a losing venture. Indeed, such a right appears to be a fundament of the taking provision."

The cases in which additional priority debts or impairments of existing property rights for continued operations have been imposed on bankrupt railroads have been consistently limited to instances where there remained some hope of an income based reorganization. In the *3R Act Cases*, this Court stated that the general *Brooks-Scanlon* rule

> is qualified by the requirement that a railroad estate suffer *interim* losses for a *reasonable period pending good-faith efforts to develop a feasible reorganization plan* if the public interest in continued rail service justifies the requirement.

419 U.S. at 122-123 (emphasis supplied; citation omitted).[17]

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[16] *Accord, Bullock* v. *Railroad Commission*, 254 U.S. 513 (1921); *Railroad Commission* v. *Eastern Texas R.R.*, 264 U.S. 79, 85 (1924); *In re Penn Central Transp. Co.*, 384 F.Supp. 895, 918-19 (Special Ct. 1974); *Valuation Proceedings*, 439 F.Supp. 1351 (Special Ct. 1977); *In re Penn Central Transp. Co.*, 382 F.Supp. 856, 868 (E.D. Pa. 1974).

[17] Earlier in the current Rock Island reorganization proceedings, Judge McGarr approved, and the Seventh Circuit upheld, a priority borrowing by the Trustee to support continued deficit operations of the Rock Island, even though that borrowing would for a time displace the interests of the estate's creditors. The borrowing was justified on the ground that it would preserve the ultimate possibility of a successful

(*footnote continued on following page*)

The *Brooks-Scanlon* line of cases and the cases where debts have been imposed to continue operations pending reorganization clearly hold that where a railroad is cashless and not reorganizable, its right to cease operations is protected by the fifth amendment and is consistent with the public interest in all its aspects. Here, the district court found that reorganization of the Rock Island is impossible. Thus, the limited period during which Rock Island investors can be assumed to have agreed to commit the estate's resources to the public's transportation needs is long past, and can be extended no further consistently with the fifth amendment. Since the Rock Island cannot any longer be required to continue to devote its resources to further the national transportation policy, *a fortiori* it cannot be required to further a component of that policy through new employee protection obligations. Now that reorganization of the Rock Island is impossible, the imposition of any priority borrowing on this estate to fund the Rock Island Act's labor protection program is impermissible. The harm to the Rock Island's creditors and shareholders through the Rock Island Act's imposition of a new $75,000,000 expense of administration is certain and actual.

B. If The Government Believes That The Public Interest Requires Protection For Former Rock Island Employees, Then The Government Must Pay For It.

It is unfortunate that the former employees of the Rock Island have lost their means of livelihood in the course of the estate's cessation of railroad operations. However, because a reorganization

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(*footnote continued from previous page*)
income-based reorganization, in which the creditors would receive full satisfaction of their claims. *In re Chicago, R.I. & P. R.R.*, 545 F.2d 1087 (7th Cir. 1976). *See, e.g., Continental Illinois Nat'l Bank and Trust Co. v. Chicago, R. I. & P. R.R.*, 294 U.S. 648 (1935); *Milwaukee Embargo, supra*, 611 F.2d at 666. Now that Judge McGarr and the Commission have ruled that there is no possibility of reorganization of the Rock Island as an ongoing rail entity, this line of cases furnishes no justification for the attempted taking of the Rock Island's property.

of the Rock Island as an operating carrier is now impossible, the imposition of any priority borrowing on this estate to fund the public purpose of the Rock Island Act's labor protection program is impermissible. If, as the RLEA and the government have argued, the Rock Island Act labor protection program is necessary to further national transportation policies, the fifth amendment principle relied upon in *Brooks-Scanlon* and its progeny requires that the government, and not the bankrupt Rock Island estate, must pay the cost of the public benefit.

Justice Holmes stated the general principle limiting governmental regulation which underlies the *Brooks-Scanlon* holding in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415-416 (1922):

> The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle. . . . *In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.*

(Citations omitted; emphasis supplied.)[18] Thus, the cost of supporting former Rock Island employees may not be charged to the

[18] In *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555 (1935), this Court concluded that the Frazier-Lemke Act was unconstitutional because it deprived creditors of their rights in specific property held as security despite the grave emergency caused by the Great Depression which confronted the nation's farmers. Justice Brandeis declared:

> "*[T]he Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation.* If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, *the burden of the relief afforded in the public interest may be borne by the public.*"

295 U.S. at 602 (emphasis supplied).

bankrupt estate of their former employer without governmental compensation which is "a full and perfect equivalent for the property taken." *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 326 (1893); *United States* v. *Reynolds*, 397 U.S. 14, 16 (1970).

C. The Rock Island Had No Existing Labor Protection Obligation. Therefore, The Rock Island Act Can Confer No Benefit On The Rock Island Estate.

The Interstate Commerce Commission has consistently declined to impose labor protection conditions in situations involving the abandonment of a railroad's entire line.[19] In *Okmulgee Northern Railway Abandonment*, 320 I.C.C. 637, 645 (1964), the Commission stated that to impose labor protection conditions in total line abandonments "would not serve, in most instances, to strengthen the transportation system . . . ."

In *Tennessee Central Railway Co. Abandonment*, 333 I.C.C. 443, 453-54 (1968), the Commission approved the total abandonment of the railroad, after years of operating losses and consumption of the railroad's property to offset those losses. The Tennessee Central had no hope of survival as a going concern. Given this history, the Commission concluded that "it was neither equitable nor warranted . . . to require further consumption of the railroad properties for the payment of employees after the railroad ceases operation." 333 I.C.C. at 454.

The Commission reaffirmed its general policy to decline to impose labor protection conditions on total line abandonments in its

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[19] *Montpelier & Barre R.R. Abandonment*, Dkt. No. AB-202 F (I.C.C. Feb. 6, 1980); *Northampton & Bath R.R. Abandonment*, 354 I.C.C. 784, 785-86 (1978); *Wellsville, Addison & Galeton R.R. Abandonment*, 354 I.C.C. 744, 746 (1978); *Rutland Rwy. Abandonment*, 317 I.C.C. 393 (1962), *aff'd sub nom. Brotherhood of Locomotive Engineers* v. *United States*, 217 F. Supp. 98 (N.D. Ohio 1963); *Chicago, Attica & Southern Carolina Rwy. Abandonment*, 261 I.C.C. 646 (1946); *East Carolina Rwy. Abandonment*, 324 I.C.C. 506 (1964).

advisory report to the Reorganization Court on May 27, 1980. (Supp. App. I-16-17.) This unbroken line of Commission precedents and the constitutional principles of *Brooks-Scanlon, supra*, underlie the reorganization court's finding of June 2, 1980, that to require the payment of further labor protection obligations in connection with the abandonment of Rock Island lines would be constitutionally impermissible and equitably unwarranted. Transcript of Proceedings, June 2, 1980, at 62-63.

As the reorganization court recognized in its ruling of June 9, 1980, no benefit to the estate can be implied from those provisions of the Act that purport to substitute a new form of labor protection for any existing labor protection, because no further labor protection obligations may constitutionally be imposed on this estate, whether their purpose is to further the national transportation policy or not. Thus, the Rock Island Act cannot be said to have "quantified" an existing obligation of the Rock Island estate. Rather, the Rock Island Act employee protection obligations are wholly new obligations imposed retroactively on the bankrupt estate, to the inevitable detriment of the estate and its creditors and shareholders.[20]

[20]Judge McGarr noted the clear difference between the Milwaukee Road and the Rock Island situations in the hearing of June 9, 1980 on the motion for a declaratory judgment and preliminary injunction:

> "I'm not aware that it has ever been held that Congress can single out a private industry in bankruptcy and legislate for this single company only labor-management rights. I'm aware that in the Milwaukee Act something of that nature seems to have been done. I'm not sure that I agree with Judge McMillen and his conclusions, but neither do I disagree, because his situation is so different than the one before me that I don't find it analogous. The Milwaukee continues to operate, the Milwaukee has problems the Rock Island doesn't have, and the Milwaukee is in a situation the Rock Island is not in."

Transcript of Proceedings, June 9, 1980, at 77. App. C, *infra*, at c-3.

Similarly, in his opinion denying the RLEA's request for a stay of the June 9 injunction, Justice Stevens noted "that the 'Milwaukee bill' concerned a genuine railroad reorganization, not a liquidation." *RLEA* v. *Gibbons, supra* note 1, 100 S.Ct. at 2670, n.1.

II.

THE ROCK ISLAND ACT PLAINLY VIOLATES THE CONSTITUTIONAL PRINCIPLES OF DUE PROCESS, SEPARATION OF POWERS AND EQUAL PROTECTION.

A. The Rock Island Act Violates The Separation Of Powers Doctrine By Directing The Reorganization Court To Impose *Any* Labor Protection Arrangement Ordered By The Commission.

The separation of powers doctrine dictates that Congress cannot use its general power to allocate judicial responsibility to prescribe a rule of decision in a pending case. Congress may not extend a particular jurisdictional grant and at the same time direct the courts as to the content of their decision-making process. *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872). Moreover, Congress cannot single out a particular court and retract that court's jurisdiction. *See, e.g., Glidden Co.* v. *Zdanok*, 370 U.S. 530, 568 (1962).[21]

Section 77(a) of the Bankruptcy Act, 11 U.S.C. § 205(a), specifically provides that the reorganization court has "exclusive jurisdiction of the debtor and its property wherever located. . . ." *New Haven Inclusion Cases*, 399 U.S. 392, 420 (1970). Section 106(c) of the Rock Island Act directs the reorganization court to "immediately authorize and direct the Rock Island Railroad Trustee to . . . immediately implement an arrangement [imposed by the Commission]." This grant of authority to the Commission, an agency by definition expert only in railroad operations, to direct the imposition of a debt on a bankrupt entity no longer involved in rail operations, clearly invades the exclusive jurisdiction of the reorganization court to administer the assets of the bankrupt estate and to adjudicate the claims thereto.

[21]This basic principle, which precludes Congressional interference in pending proceedings, was applied in a pending bankruptcy proceeding in 1881. *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881).

B. The Rock Island Act Further Violates The Due Process And Separation Of Powers Principles By Its Extraordinary Curtailment Of Appellate Review.

The Staggers Rail Act amendments to Section 124 of the Rock Island Act impose extraordinary new limitations on appellate review. App. B, *infra.* They thus compound—rather than cure, as the government suggests—the constitutional defects of the original Rock Island Act.

Rather than permitting rational review of the Rock Island Act to go forward, the unusual procedure required by Section 124 of the amended Rock Island Act seeks to strip this Court of jurisdiction over a case already pending before it under 28 U.S.C. § 1252. Section 124 appears to require the court of appeals to assume jurisdiction to review the subsidiary order of October 15, 1980 in a piecemeal fashion. If this provision was intended to strip this Court of its jurisdiction over a pending case, because the denials by Justice Stevens and this Court of the RLEA's stay motion reflected this Court's preliminary view that the Rock Island Act is unconstitutional, the provision clearly violates the principles of *United States* v. *Klein, supra.*

The sum effect of this extraordinary Congressional interference with pending litigation has resulted in the procedural confusion surrounding these proceedings. The inevitable result is a further infringement of the constitutional rights of the Rock Island estate.[22]

C. The Rock Island Act Unconstitutionally Singles Out the Rock Island.

The unconstitutionality of the Rock Island Act labor protection scheme as a taking and deprivation of property is accentuated by

[22]The proceedings before the court of appeals were replete with procedural unfairness to the Rock Island estate. The extraordinary requirements of Section 124(b) of the Staggers Rail Act amendments that those appeals be heard in an *en banc* proceeding, and determined within 60 days of the date the last appeal was filed (exacerbated

(*Footnote continued on following page*)

the fact that the Act singles out only one company upon which to impose its new obligations. By singling out the Rock Island from all other companies and railroads in reorganization and imposing on it special, unprecedented burdens, the Rock Island Act clearly offends the due process and equal protection clauses of the fifth amendment.

The presumption of validity which this court has applied to laws involving general "socioeconomic" regulation has not served to sustain acts such as the Rock Island legislation, which are "not even purportedly enacted to deal with a broad, generalized economic or social problem." *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 235 (1978). This is especially so where the liability imposed is "a sudden, totally unanticipated, and substantial retroactive obligation upon the company to its employees. . . ." 438 U.S. at 249. *See also Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U.S. 330, 349-50 (1935).

Moreover, by imposing only upon the Rock Island extraordinary retroactive labor protection burdens, the Rock Island Act's

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(*Footnote continued from previous page*)
by the tardy filing of briefs by all the appellants), resulted in an inadequate period for briefing and argument of those appeals, including the preliminary matters to be addressed.

Section 124(b) of the amended Rock Island Act appeared to require that the proceeding in the court of appeals be consolidated with the pending appeal concerning the unrelated Milwaukee Road Restructuring Act labor protection scheme. The parties to the Milwaukee Road appeal sought to dismiss that appeal the day of oral argument, over the objections of the United States and the Commission. That dismissal was granted on December 3, 1980. Nevertheless, the appeal was fully briefed, and the Milwaukee Road Trustee participated in the Rock Island Act appeal as an adversary to the Trustee, creditors and shareholders. Participation in the Seventh Circuit appeals by the Milwaukee Road Trustee forced the Rock Island Trustee, creditors and shareholders to confront the Milwaukee Road Trustee as an adversary, although the Milwaukee Road case is wholly unrelated to the Rock Island situation, and the parties in the Milwaukee Road appeal did not participate in the proceedings before the Rock Island reorganization court.

labor protection scheme penalizes the Rock Island for exercising its constitutional right to withdraw from losing railroad operations. By doing so, it resembles the type of special punitive legislation which the constitutional prohibition against bills of attainder was designed to prevent.[23] Thus, the Rock Island Act manifestly constitutes a particularized confiscation rather than legitimate regulation.

D. The Rock Island Act Violates The Constitutional Requirement That Bankruptcy Laws Be Uniform.

Article I, Section 8, clause 4 of the United States Constitution requires that legislation "on the subject of bankruptcies" must apply equally to all similar bankruptcies throughout the country.[24] *Hanover National Bank* v. *Moyses*, 186 U.S. 181, 188 (1902).

In *In re Sink*, 27 F.2d 361 (W.D. Va. 1928), *appeal dismissed*, 30 F.2d 1019 (4th Cir. 1929), a law dealing with a single bankrupt and authorizing action by a single federal district court was

[23]Bills of attainder are:

> "[l]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial. . . ."

United States v. *Lovett*, 328 U.S. 303, 315 (1946). *See also United States* v. *Brown*, 381 U.S. 437 (1965); *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 475 (1977).

[24]The Supreme Court, in *Continental Illinois Nat'l Bank and Trust Co.* v. *Chicago, R. I. & P. R.R.*, 294 U.S. 648, 673 (1935), stated that the "subject of bankruptcies" involves:

> "nothing less than 'the subject of the relations between an insolvent or non-paying or fraudulent debtor, and his creditors, extending to his and their relief.' "

(Citations omitted.) The Rock Island Act is certainly bankruptcy legislation subject to the uniformity clause, because it involves the priority and use of government loans, the imposition of new debt on the debtor's estate, and the treatment of labor protection claims.

invalidated as a violation of the uniformity clause. The *Sink* court declared that "a statute which applies to only one bankruptcy is as far from being uniform as is possible." 27 F.2d at 361.

In the *3R Act Cases, supra*, this Court upheld the Regional Rail Reorganization Act of 1973 against a non-uniformity challenge. The Court found that although on its face the 3R Act applied to railroad reorganizations in only a single, statutorily defined region, nationwide geographic uniformity was *de facto* present under the 3R Act. 419 U.S. at 159-160.[25]

Unlike the 3R Act, and like the statute addressed in *Sink*, the Rock Island Act is explicitly tailored and applicable to only one rail carrier in the process of reorganization and liquidation at a time when other Section 77 reorganizations pend in the same judicial district and elsewhere. The *de facto* geographic uniformity which insulated the 3R Act from the effect of the uniformity clause cannot justify the non-uniformity of the Rock Island Act.

III.

THE POSSIBILITY OF A LATER TUCKER ACT REMEDY CANNOT JUSTIFY OTHERWISE UNCONSTITUTIONAL GOVERNMENTAL ACTS

The new section 124(c) of the amended Rock Island Act states that the statute does not limit any right to bring a subsequent suit under the Tucker Act, should the labor protection provisions of

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[25]This Court stated:

> "The argument that the Rail Act differs from the head tax statute because by its own terms the Rail Act applies only to one designated region is without merit. The definition of the region does not obscure the reality that the legislation applies to all railroads under reorganization pursuant to §77 during the time the Act applies."

419 U.S. at 161. It thus shared the view expressed by Judge Friendly in his opinion for the Special Court. *In the Matter of Penn Central Transp. Co.*, 384 F. Supp. 895, 916 (Special Ct., 1974).

the Act prove to be unconstitutional.[26] The federal appellees rely primarily on this amendment to argue that the constitutional questions raised in this appeal are moot.

The government's contention is founded on the proposition that the Rock Island Act's clear violation of the Rock Island's fifth amendment property and due process rights may go forward if a later possibility of redress through a Tucker Act suit remains. This is the same premise that the RLEA and the government relied upon to support the motions of October 7, 1980 to vacate the injunction against the implementation of the Rock Island Act, and to argue in favor of the amended statute's validity before the court of appeals. It was found wholly inadequate by the district court on October 15, 1980, and is at the heart of the appeal now pending before the court of appeals. Indeed, as the district court properly found, this proposed reliance on a provision which does not bar a later uncertain remedy for the taking of the property of a bankrupt estate to authorize the prior commission of an otherwise unconstitutional act flies in the face of the most basic due process principles of our Constitution.[27]

A. The Availability And Adequacy Of The Tucker Act Remedy In The *3R Act Cases* Does Not Justify The Rock Island Act's Taking, Where Congress Has Refused To Acknowledge Any Liability, And Where The Taking Has Been Found To Be Unconstitutional.

The constitutional defects of the Rock Island Act cannot be cured by the oblique reference to the Tucker Act in the Staggers

[26]Section 701(a)(1) of the Staggers Rail Act of 1980, which amends Section 124(c) of the Rock Island Act provides:

> "Nothing in this Act or in the Milwaukee Railroad Restructuring Act (45 U.S.C. 901, *et seq.*) shall limit the right of any person to commence an action in the Court of Claims under section 1491 of title 28, United States Code (commonly referred to as the Tucker Act)."

[27]*See, e.g. Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *see also* Transcript Of Proceedings, October 7, 1980, App. F, *infra*, at f-2-3; Brief of the Trustee and Creditors at 54-55, November 10, 1980 (Supp. App. F-67-68).

Rail Act. Apparently Congress relies on the *3R Act Cases, supra,* in concluding otherwise. *See* Joint Explanatory Statement of the Conference Committee, H.R.REP. NO. 1041, 96th Cong., 2d Sess. (1980), *reprinted in* 96 Cong. Rec. at H-9931 (daily ed. Sept. 29, 1980). App. B, *infra,* at b-5-6. This Congressional misapprehension that the Tucker Act provides a cure can be derived only from a superficial reading of the *3R Act Cases* opinion.

The Regional Rail Reorganization Act of 1973, 45 U.S.C. §701, *et seq.* (the "3R Act") established a new entity, known as Conrail, to own and operate the bankrupt railroads of the Northeast. The Act required the private owners of the bankrupt railroads immediately to convey their property interests to Conrail, taking in exchange Conrail securities and federally guaranteed United States Railway Association obligations funded by an immediate grant of $500,000,000. In addition to this grant, one billion dollars was appropriated to fund the rehabilitation and reorganization of the new rail entity. The new entity was thus initially funded with all the assets of the former private railroads, as well as federal funds in the amount of $1.5 billion.

In adjudicating the constitutionality of the 3R Act, this Court in the *3R Act Cases* made it plain that the validity of the 3R Act plan rested on its provision for full and adequate compensation to creditors. Justice Brennan stated:

> Congress has not formulated an unconstitutional reorganization plan in compelling a reorganization wherein the compensation to appellees consists of Conrail and USRA securities and other benefits 'so long as the creditor gets all the value of his lien and his share of any free assets.' *RFC* v. *Denver & R.G.W.R. Co.* [328 U.S. 495, 533].

419 U.S. at 154-55.

This Court explained the Congressional failure to mention the availability of a Tucker Act remedy in the Conrail scheme as follows:

> Congress was so convinced that the huge sums provided would surely equal or exceed the required constitutional minimum that it never focused upon the possible need for a suit in the Court of Claims.

419 U.S. at 128. This inference affirmed the reading of legislative history and Congressional intent in the decision of Judge Friendly, from which the appeal was taken, *In re Penn Central Transportation Co.*, 384 F.Supp. 895, 941, *et seq.* (Special Ct. 1974). Thus, in the *3R Act Cases, supra,* both the Congress and the Supreme Court acknowledged that compensation was owed to the Penn Central for the taking of its property, prior to the taking.

The 3R Act plan was necessary to accomplish the goal of reorganizing the railroads of the Northeast. The government took specific rail properties needed to form the new government-owned rail corporation. Like "quick-taking" condemnation proceedings,[28] the 3R Act provided an immediate payment for Northeast rail properties for which the government had an emergent need, with the promise of a more extended valuation proceeding to ensure just compensation.

The Rock Island Act's taking of $75,000,000 of the Rock Island's property in cash, the value of which is immediately known, is sharply different from the conveyance of specific rail properties of unknown value to establish the Conrail entity. Here, Congress is not taking unique rail property needed for public use.[29] Rather, it is requiring the expenditure of the Rock Island's private funds to achieve a perceived public purpose, which Congress could, if it chose to do so, fund directly.

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[28] *See, e.g.*, ILL. REV. STAT. ch. 47, §2.2 (1979).

[29] The government cannot claim that it has an emergent need for the cash of a bankrupt railroad.

In the 3R Act conveyance to Conrail, Congress conceded the liability of the United States in the statutory scheme. Congress appropriated a total of $1.5 billion in the 3R Act to assure compensation, with the Tucker Act remedy available should any shortfall occur. Thus, the only question presented in the *3R Act Cases* was not whether there would be any compensation by the Government, but whether the amount of compensation made available would ultimately be adequate. By contrast, Congress has declined to appropriate a penny to cover the cost of the Rock Island Act employee protection scheme. In the case of the Rock Island, Congress steadfastly refuses to concede any possible liability.

B. The Bare Statement That Tucker Act Jurisdiction Is Not Precluded Cannot Compensate The Rock Island For the Loss Of Its Fifth Amendment Rights, Or Alleviate The Act's Irreparable Injury To The Estate.

The inherent limitations of the Tucker Act make apparent the constitutional impropriety of its use to warrant a prospective taking of the Rock Island's property, as the government and the RLEA have proposed. This Court has stated that "[t]he Tucker Act . . . is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages." *United States* v. *Testan*, 424 U.S. 392, 398 (1976).

Moreover, a Tucker Act remedy requires a clear acknowledgment of federal liability. *United States* v. *Testan, supra*, 424 U.S. at 400-01; *Whiskers* v. *United States*, 600 F.2d 1332 (10th Cir. 1979), *cert. denied*, 100 S. Ct. 1028 (1980). Unlike the 3R Act, the Rock Island Act contains no clear acknowledgment or indication that the Government intends to pay the $75,000,000 cost of the Act's labor protection scheme. The Tucker Act is intended to remedy only certain governmental wrongs which have already

occurred. The Tucker Act provision in the Rock Island Act amendments, however, is sought to be used as a device to warrant *future* takings of private property.

In its June 9, 1980 grant of a preliminary injunction, the Rock Island Reorganization Court noted the clearly disclosed Congressional intention not to compensate the Rock Island estate for sums expended under the original Rock Island Act. This reading was confirmed by Justice Stevens in his opinion denying the RLEA's application for a stay of the injunction. *RLEA* v. *Gibbons, supra,* 100 S. Ct. at 2670, n.1.

The amended Rock Island Act's oblique reference to the possible commencement of a later suit under the Tucker Act indicates no Congressional intent to bear the cost of the Rock Island Act's labor protection scheme. Moreover, neither the Rock Island Act amendments nor their legislative history disclose any Congressional intention to repudiate its initial denial of federal compensation for the cost of the program. The only legislative comment concerning funding of Rock Island employee protection in the Staggers Rail Act appears in the Conference Committee's Joint Explanatory Statement:

> Benefits and allowances under this arrangement shall be paid by the Rock Island Railroad and shall be treated as administrative expenses of the estate of the Rock Island Railroad. By specifically stating that there is a Tucker Act remedy, the benefits and allowances will immediately become available to the qualifying Rock Island employees and the Trustee may pursue his allegations of unconstitutional action under the Tucker Act.

H.R. REP. NO. 1041, *supra*, 96 Cong.Rec. H-9931. App. B, *infra*, at b-6.

This language indicates no Congressional admission of liability for the employee protection scheme established under the Act.

Rather, it indicates once again Congressional intent to go forward with the scheme, and to deny compensation to the Rock Island regardless of the clear unconstitutionality of the Rock Island Act.

In his order of October 5, 1980, refusing to vacate his outstanding injunction, Judge McGarr concluded that the Staggers Rail Act's mere reference to a possible later Tucker Act remedy did not alter the irreparable harm which would be suffered by the Rock Island estate. He stated:

> Petitioner argues that the statutory scheme can be implemented, the money disbursed, and the validity of the program and extent of the Rock Island liability to finance it, later litigated. This, in fact, cannot be done without irreparable injury to the administration of the estate for the benefit of the creditors. The trustee is currently liquidating assets and preparing the plan for distribution to creditors. Under court order, the trustee is also preparing an interim plan for the immediate partial satisfaction of cost of administration claims. The imposition of a $75,000,000 uncertainty on the estate will totally halt the liquidation for the long period consumed by the appellate process, with irreparable injury to the already long-suffering creditors. Further, the whole liquidation plan will be distorted by the brooding omnipresence of a potential liability representing a significant percentage of the total assets.

App. G, *infra*, at g-3.

Therefore, Judge McGarr, who has presided over the Rock Island's reorganization and liquidation for five years, continued in effect the injunction issued to protect a bankrupt estate from irreparable injury through the operation of a statutory scheme which he considered clearly unconstitutional. Judge McGarr was manifestly correct in this finding of no change in the effect of the Rock Island Act on the Rock Island estate by the superficial addition of an uncertain possibility of a later remedy.

V

THE QUESTIONS RAISED IN THIS APPEAL ARE NOT MOOTED BY THE STAGGERS RAIL ACT OR THE APPEAL OF JUDGE McGARR'S OCTOBER 15, 1980 ORDER TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

In their response to the RLEA's jurisdictional statement in this appeal, the federal appellees contend that this appeal is moot, because the enactment of the "new" Staggers Rail Act amendments has repealed the Rock Island Act, to replace it with a wholly new statutory scheme for review by the courts.

In its argument that this appeal is moot, the government relies upon the statement in *United States* v. *Alaska Steamship Co.*, 253 U.S. 113, 116 (1920) that "[w]here by an act of the parties or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly." Here, there is no question that the "existing controversy" between the parties has not "come to an end" by virtue of the Staggers Rail Act amendments.

On October 7, 1980, Judge McGarr expressly stated:

> This is not new legislation in my view. This is amended legislation which attempts, but fails, to clear the underlying flaws which caused me to find the bill unconstitutional in the first place. It remains basically the same law with the same defects and remains subject to the same injunction.

Transcript of Proceedings, October 7, 1980, at 31-32. App. F, *infra*, at f-3. The government's contention overlooks the clear effect and meaning of the Rock Island Act amendments, as recognized by Judge McGarr.

In *Alaska Steamship, supra*, the passage of the subsequent statute made it "apparent that the complainants do not now need an

injunction. . . ." 253 U.S. at 116. Here, by contrast, Judge McGarr properly concluded that the existing injunction was still necessary to protect the Rock Island estate from the irreparable injury that would result from the implementation of the same Rock Island Act scheme, as reenacted by the Staggers Rail Act amendments. This Court should, as Judge McGarr properly did, look to the actual effect of the statute, as amended, to determine whether this appeal is moot.[30]

For this Court to grant the federal appellees' request to determine that this appeal is moot would be implicitly to reverse the trial court's determination as to the effect of the Staggers Rail Act amendments. Moreover, for this Court to determine that this appeal is moot on the basis of the reenactment with no substantive changes—but new provisions for judicial review—of a statute once declared unconstitutional, would be to permit blatant Congressional forum-shopping and would affront the policies against piecemeal appellate review of 28 U.S.C. §1252.

Thus, whatever the determination of the court of appeals as to the effect of the Staggers Rail Act amendments, the questions concerning the constitutionality of the basic Rock Island Act employee protection scheme, which was reenacted without substantial change in the Staggers Rail Act, remain ripe for determination by this Court.

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[30]In *Zablocki* v. *Redhail*, 434 U.S. 374, 382 n. 9 (1978), also cited by the federal appellees, this Court decided an appeal from a Wisconsin statute, although the Wisconsin legislature had passed a somewhat narrower "stopgap" statute while the appeal was pending, where the old, unconstitutional statute would go back into effect if the injunction was lifted. This Court should, as it did in *Zablocki*, decide the appeal despite the enactment of a subsequent statute which does not alter the unconstitutional statutory scheme.

CONCLUSION

For the foregoing reasons, appellees respectfully request that this Court note probable jurisdiction of this appeal and affirm the district court's order of June 9, 1980.

Respectfully submitted,

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December 17, 1980

APPENDIX A

EXCERPTS FROM THE ROCK ISLAND RAILROAD TRANSITION AND EMPLOYEE ASSISTANCE ACT

EMPLOYEE PROTECTION AGREEMENTS

Sec. 106 (a) No later than 10 days after the date of enactment of this Act, in order to avoid disruption of rail service and undue displacement of employees, the Rock Island Railroad and labor organizations representing the employee of such railroad with the assistance of the National Mediation Board, may enter into an agreement providing protection for employees of such railroad who are adversely affected as a result of a reduction in service by such railroad. Such employee protection may include, but need not be limited to, employee relocation incentive compensation, moving expenses, and separation allowances.

(b) If the Rock Island Railroad and the labor organizations representing the employees of such railroad are unable to enter into an employee protection agreement under subsection (a) of this section within 10 days after the date of enactment of this Act, the parties shall immediately submit the matter to the Commission. The Commission shall impose upon the parties by appropriate order a fair and equitable arrangement with respect to employee protection no later than 30 days after the date of enactment of this Act, unless the Rock Island Railroad and the authorized representatives of its employees have by then entered into a labor protection agreement. For purposes of this subsection, the term "fair and equitable" means no less protective of the interests of employees than protection afforded under section 9 of the Milwaukee Railroad Restructuring Act (45 U.S.C. 908), subject to the limitations set forth in section 110 of this title.

(c) If an employee protection arrangement is imposed by the Commission under subsection (b) of this section, the bankruptcy

court shall immediately authorize and direct the Rock Island Railroad trustee to, and the labor organizations representing the employees of the railroad shall, immediately implement such arrangement.

(d) (1) An order of the Commission under subsection (b) of this section may not be stayed by the Commission or by any court, and an order of the bankruptcy court under subsection (c) of this section may not be stayed by any other court.

(2) Any order described in paragraph (1) of this subsection may be appealed only to the court of appeals of the United States having jurisdiction to review decisions and orders of the bankruptcy court. Any such appeal to such court of appeals shall be filed within 5 days after the date of entry of the order of the Commission or the bankruptcy court, as the case may be, and such court of appeals shall finally determine such appeal within 60 days after the date such appeal is filed. No determination by the court of appeals under this subsection may be reviewed in any other court.

(e) (1) Any claim of an employee for benefits and allowances under an employee protection agreement or arrangement entered into under this section shall be filed with the Board in such time and manner as the Board by regulation shall prescribe. The Board shall determine the amount for which such employee is eligible under such agreement or arrangement and shall certify such amount to the Rock Island Railroad for payment.

(2) Benefits and allowances under such agreement or arrangement entered into under this section shall be paid by the Rock Island Railroad from its own assets or in accordance with section 110 of this title, and claims of employees for such benefits and allowances shall be treated as administrative expenses of the estate of the Rock Island Railroad.

(f) The first sentence of section 7(b)(7) of the Railroad Retirement Act of 1974 (45 U.S.C. 231(b)(7)) is amended by striking out "and the Milwaukee Railroad Restructuring Act" and inserting in lieu thereof, "the Milwaukee Railroad Restructuring Acts, and the Rock Island Railroad Transition and Employee Assistance Act."

* * *

OBLIGATION GUARANTEES

Sec. 110. (a) The Secretary, under the authority of section 511 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 831), shall guarantee obligations of the Rock Island Railroad for purposes of providing employee protection in accordance with the terms of any employee protection agreement or arrangement entered into under section 106 of this title.

(b) Any obligation guaranteed pursuant to this section shall be treated as an administrative expense of the estate of the Rock Island Railroad.

(c) The aggregate unpaid principal amount of obligations which may be guaranteed by the Secretary pursuant to this section shall not exceed $75,000,000.

(d) The total liability of the Rock Island Railroad in connection with benefits and allowances provided under any employee protection agreement or arrangement entered into under section 106 of this title shall not exceed $75,000,000.

(e) Except in connection with obligations guaranteed under this section, the United States shall incur no liability in connection with any employee protection agreement or arrangement entered into under section 106 of this title.

(f) Section 511(g) and section 516 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 831(g) and 836) shall not apply to any obligation guaranteed under this section.

APPENDIX B

EXCERPTS FROM THE CONFERENCE REPORT ON THE RAILROAD TRANSPORTATION POLICY ACT OF 1980 (AMENDMENTS TO THE ROCK ISLAND ACT)

TITLE VII—MISCELLANEOUS PROVISIONS
Rock Island and Milwaukee Railroads Amendments

Sec. 701. (a)(1) The Rock Island Railroad Transition and Employee Assistance Act (45 U.S.C. 1001 et seq.) is amended by redesignating section 124 as section 125 and by inserting immediately after section 123 the following new section:

"*Judicial Review*

"Sec. 124. (a) Notwithstanding any other provision of law, any appeal from—

"(1) any decision of the bankruptcy court with respect to the constitutionality of any provision of this Act; and

"(2) any decision of the court having jurisdiction over the reorganization of the Milwaukee Railroad with respect to the constitutionality of the Milwaukee Railroad Restructuring Act (45 U.S.C. 901 et seq.), shall be taken to the United States Court of Appeals for the Seventh Circuit.

"(b) If appeals are taken from decisions described in subsection (a) of this section involving section 106 or 110 of this title or section 9 or 15 of the Milwaukee Railroad Restructuring Act, the court of appeals shall determine such appeals in a consolidated proceeding, sitting en banc, and shall render a final decision no later than 60 days after the date the last such appeal is filed.

"(c) Nothing in this Act or in the Milwaukee Railroad Restructuring Act (45 U.S.C. 901 et seq.) shall limit the right of any

person to commence an action in the United States Court of Claims under section 1491 of title 28, United States Code (commonly referred to as the Tucker Act)."

(2) Section 110(e) of the Rock Island Railroad Transition and Employee Assistance Act (45 U.S.C. 1008(e)) is amended by inserting "to employees" immediately after "liability"

(3) Section 15(e) of the Milwaukee Railroad Restructuring Act (45 U.S.C. 914(E)) is amended by inserting "to employees" immediately after "liability".

(b)(1) Section 106 of the Rock Island Railroad Transition and Employee Assistance Act (45 U.S.C. 1005) is amended to read as follows:

"*Employee Protection Agreements*

"Sec. 106. (a) No later than 5 days after the date of enactment of the Staggers Rail Act of 1980, in order to avoid disruption of rail service and undue displacement of employees, the Rock Island Railroad and labor organizations representing the employees of such railroad with the assistance of the National Mediation Board, may enter into an agreement providing protection for employees of such railroad who are adversely affected as a result of a reduction in service by such railroad. Such employee protection may include, but need not be limited to, employee relocation incentive compensation, moving expenses, and separation allowances.

"(b) If the Rock Island Railroad and the labor organizations representing the employees of such railroad are unable to enter into an employee protection agreement under subsection (a) of this section within 5 days after the date of enactment of the Staggers Rail Act of 1980, the matter shall be immediately submitted to the Commission. The Commission shall impose upon the parties by appropriate order a fair and equitable arrangement with

respect to employee protection no later than 15 days after the date of enactment of the Staggers Rail Act of 1980, unless the Rock Island Railroad, and the authorized representatives of its employees have by then entered into a labor protection agreement. For purposes of this subsection, the term 'fair and equitable' means no less protective of the interests of employees than protection established by and pursuant to section 9 of the Milwaukee Railroad Restructuring Act (45 U.S.C. 908), subject to the limitations set forth in section 110 of this title.

"(c) If an employee protection arrangement is imposed by the Commission under subsection (b) of this section, the bankruptcy court shall immediately authorize and direct the Rock Island Railroad trustee to, and the Rock Island Railroad trustee and the labor organizations representing the employees of the railroad shall, immediately implement such arrangement.

"(d) Any order of the Commission under subsection (b) of this section and any order of the bankruptcy court under subsection (c) of this section may be appealed only to the United States Court of Appeals for the Seventh Circuit. Any such appeal to such court of appeals shall be filed within 5 days after the date of entry of the order of the Commission or the bankruptcy court, as the case may be, and such court of appeals shall finally determine such appeal within 60 days after the date such appeal is filed.

"(e)(1) Any claim of an employee for benefits and allowances under an employee protection agreement or arrangement entered into under this section shall be filed with the Board in such time and manner as the Board by regulation shall prescribe. The Board shall determine the amount for which such employee is eligible under such agreement or arrangement and shall certify such amount to the Rock Island Railroad for payment.

"(2) Benefits and allowances under such agreement or arrangement entered into this section shall be paid by the Rock

Island Railroad from its own assets or in accordance with section 110 of this title, and claims of employees for such benefits and allowances shall be treated as administrative expenses of the estate of the Rock Island Railroad.

"(f) The first sentence of section 7(b)(7) of the Railroad Retirement Act of 1974 (45 U.S.C. 231f(b)(7)) is amended by striking out "Milwaukee Railroad Restructuring Act" and inserting in lieu thereof", the Milwaukee Railroad Restructuring Act, and the Rock Island Railroad Transition and Employee Assistance Act."

(2) Section 108(a) of the Rock Island Railroad Transition and Employee Assistance Act (45 U.S.C. 1007(a)) is amended by inserting immediately before the period at the end thereof the following: "(other than as provided in the agreement entered into in Washington, District of Columbia, on March 4, 1980, entitled 'Labor Protective Agreement Between Railroads Parties Hereto Involved in Midwest Rail Restructuring and Employees of Such Railroads Represented by the Rail Labor Organizations Operating Through the Railway Labor Executives' Association')."

(3) Section 103(5) of the Rock Island Railroad Transition and Employees Assistance Act (45 U.S.C. 1002(5)) is amended by inserting immediately before the period at the end thereof the following: "the estate of such Company in its reorganization proceeding, or the trustee appointed in such proceeding".

* * *

JOINT EXPLANATORY STATEMENT OF THE CONFERENCE COMMITTEE

Section 701—Rock Island and Milwaukee Railroads [A]mendments

Senate bill. No provision.

House amendment. The House amends the Rock Island Transition and Employee Assistance Act and the Milwaukee Railroad Restructuring Act in several instances. The Amendment provides that any decision with respect to constitutionality of the Rock Island Transition Act or the Milwaukee Railroad Restructuring Act from the respective courts having jurisdiction over the respective railroads in bankruptcy shall be taken to the United States Court of Appeals for the Seventh Circuit. If a constitutional challenge is made to the procedure under this provision, the challenge shall be heard by the United States Court of Appeals for the Seventh Circuit because the procedure is part of the Rock Island Transition Act. Should the appeals on constitutionality involve section 106 or section 110 of the Rock Island Transition Act or sections 9 or 15 of the Milwaukee Railroad Restructuring Act, regarding the claim of administration for employee protection claims, the court shall determine the appeals in a consolidated proceeding and render a final decision no later than 60 days after the last such appeal is filed.

The House amendment clarifies the Rock Island Transition and Milwaukee Railroad Restructuring Act to state affirmatively that nothing in these acts shall limit the right of any person to bring an action under the Tucker Act. This provision was not in the original Acts on the grounds that there continued to exist a Tucker Act remedy where Congress has not explicitly waived such a remedy. See Regional Rail Reorganization Cases, 419 U.S. 102, 125 (1974). However, in reviewing Judge [Mc]Garr's injunction of the Rock Island Transition Act, Justice Stevens

expressed concern about the availability of such a remedy where [*sic*] the injunction to be lifted and were the Act subsequently to be held unconstitutional, _____ U.S. _____ (1980). This specific provision clearly establishes that the Tucker Act is available and nothing in these Acts limits the right of any person to seek redress under the Tucker Act.

The House amendment provides for a new schedule for the negotiation of an employee protection agreement between the Rock Island Railroad and the Labor organizations. If these parties are not able to come to an agreement within 5 days, the Commission is to impose a fair and equitable arrangement no less protective of the interests of employees than the protection established under section 9 of the Milwaukee Railroad Restructuring Act within 15 days after the enactment of the Staggers Rail Act. The bankruptcy court shall order the Rock Island Trustee and the Rock Island employee organizations to implement such arrangement immediately. Any order of the Commission or the bankruptcy court with respect to implementing such order shall be appealed only to the United States Court of Appeals for the Seventh Circuit within 5 days after the order of the Commission or the bankruptcy court, whichever is later, and shall be determined within 60 days after the appeal is filed. Benefits and allowances under this arrangement shall be paid by the Rock Island Railroad and shall be treated as administrative expenses of the estate of the Rock Island Railroad. By specifically stating that there is a Tucker Act remedy, the benefits and allowances will immediately become available to the qualifying Rock Island employees and the Trustee may pursue his allegations of unconstitutional action under the Tucker Act.

Under Section 7(d), (e), and (f) of the Milwaukee Railroad Restructuring Act, certain obligations to the United States were subordinated to the creditors, but not the stockholders. Hence, there is a gap between these two classes of interests. The House

amendment eliminates this gap, by forgiving such subordinated obligations to the United States when the Milwaukee Railroad is either successfully reorganized as a rail carrier or when more than 50% of the railroad as it exists on the effective date of the Staggers Rail Act is purchased and 50% of its employees on that date have obtained employment with other carriers. By eliminating this gap in this way, the House amendment will encourage the Milwaukee Railroad's stockholders to seek a successful reorganization or purchase and not feel it necessary to seek liquidation at this time.

Additional funds for Transaction Assistance under the Rock Island Transition Act for the purchase of abandoned lines by non-rail carrier entities of the Rock Island Railroad and Milwaukee Railroad and for rail banking of lines of the Milwaukee Railroad in Montana are made available. The Secretary may determine if applications for purchase filed after September 15, 1980, are appropriate. Other than the funds specifically reserved for Montana[,] Transition assistance funds should be equitably distributed without State preference to non-carrier entities which have applied for funds.

Conference substitute. The Conference substitute adopts the House provision, with minor modifications and deletion of the new findings for the Rock Island Transition Act. The conferees believe that there is an obligation upon the Rock Island estate to provide employee protection as a claim of administration to its employees who were not covered by the March 4, 1980, agreement. Further, the conferees believe the Rock Island estate has benefitted from the Rock Island Transition Act by the reduction in its employee protection liability and through the Congressionally supported March 4, 1980, agreement, the ability to lease its facilities and the use of funds to purchase its facilities, thus preserving its value as a going concern, and the expeditious consideration of Rock Island transactions at the Commission. The

conferees reiterate that it is the intention of Congress that employee protection be imposed in bankruptcy proceedings involving major rail carriers, for to do otherwise would be to promote liquidations, to the detriment of the employees and the public interest.

APPENDIX C

EXCERPTS FROM THE TRANSCRIPT OF PROCEEDINGS JUNE 9, 1980

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of: CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, *Debtor.*	No. 75 B 2697

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled matter before the HONORABLE FRANK J. MCGARR, one of the Judges of said Court, in his courtroom, in the United States Courthouse, Chicago, Illinois, on Monday the 9th day of June, 1980, at the hour of 10:00 o'clock a.m.

* * *

THE COURT: I don't think a response will be necessary, in light of the time, as we've gone well into the lunch hour. I have a matter at 2:00 o'clock that will take all afternoon. I indicated at the conclusion of the argument I would indicate my ruling on the application filed by the Trustee and the creditors this morning, it's my intention now to do so, if I can get the many notes I made in some form of order.

It's of no news to anybody here interested in this case that for well over four years, closer to five years, I guess, I have been trying to balance the public interest against the rights of the creditors, that I have sanctioned the continued operations of the Rock Island towards the end of an anticipated an [d] hoped for reorganization. Events indicated down the line, and I accepted as inevitable, the fact that that effort had and would continue to fail, and therefore

recently, in view of that conclusion, I ordered the termination of operations and the abandonment of the Rock Island operation. The Commerce Commission agreed with me, and after hearing that, I entered the final order, and we do not now have before us, for any consideration, an operating railroad.

The basic thrust and historical mission of the Commerce Commission is to oversee the operations of railroads, not their liquidation, and to oversee the terms and conditions in this case of contracts entered into with other railroads to continue to operate segments of the Rock Island, if any such agreement is reached. This jurisdiction, however, is basically over the new operating entity, the Rock Island not being an operating entity.

I have before me today an application for a declaratory judgment that has to do with a statute recently enacted and an attack upon its constitutionality, and in argument there has been adverted to, and I have in front of me, the text of the preamble to that statute, the Rock Island, Section 102, and the preamble indicates the pursuit of Congress of the interest of seeking the uninterrupted continuation of services over Rock Island lines, dependent as it is, and I'm not reading, I'm paraphrasing, an adequate employee protection provision, covering Rock Island Railroad employees who are not hired by other railroads.

There is in that, and the following three paragraphs of the preamble, a basic illogic, a basic contradiction which I'm at a loss to understand. What the statute addresses itself to is labor protection for those employees who will not be absorbed by whatever segments of the Rock Island are continuing to operate, and therefore the purpose of uninterrupted continuation of services over Rock Island Lines, as part of the preamble to this statute, remains to those persons arguing it, and to me, something of a mystery. The important thing to remember is that whatever public purpose and public interest there remains in this case is the problem of the

other carriers and the Interstate Commerce Commission and the on-going supervision by the I.C.C. of the operations of the other carriers over Rock Island Lines that they may have acquired. But, the Rock Island is a bankrupt corporation with no more operations, nothing left but assets and creditors and liquidation. Whatever obligations it may have to labor, it must arrive out of a contract that it had with labor, and any appropriate claims of labor under existing bankruptcy law is under the Railroad Retirement Act or any other statute which operates to fix the rights of labor. There are pension rights, I assume, there may be wage claims that can be resolved. But, these are all based upon existing law, existing rights, existing contracts, and that Congress believes that it can legislate a $75 million labor protection burden on the assets of the Rock Island comes to me as a startling concept. That the Government will lend or the FRA will lend the $75 million is irrelevant in the face of the fact that obviously that becomes a claim against the Estate in derogation of the rights of the creditors in whatever assets the Estate now has.

I'm not aware that it has ever been held that Congress can single out a private industry in bankruptcy and legislate for this single company only labor-management rights. I'm aware that in the Milwaukee Act something of that nature seems to have been done. I'm not sure that I agree with Judge McMillen and his conclusions, but neither do I disagree, because his situation is so different than the one before me that I don't find it analogous. The Milwaukee continues to operate, the Milwaukee has problems the Rock Island doesn't have, and the Milwaukee is in a situation the Rock Island is not in.

It seems to me clear, without the necessity of a great deal of argument, that the Rock Island Act, which is the subject of our deliberations today, is an unconstitutional taking, an unconstitutional deprivation of the property rights of the creditors. It seems to be thus in two respects at least, and probably more, but the

labor protection aspect of it, which has been argued today at some length, and in addition, the curious procedural deprivation of the ordinary rights of adjudication and appeal of decision affecting the property rights of creditors in a bankruptcy case.

The labor protection scheme, however, is central to the legislation, and its infirmities are sufficient basis for the ruling that I intend to make today. But, while this is true, there are other aspects of the legislation that I have adverted to of dubious constitutionality. One I have mentioned is the strangely trunkated [*sic*] appellate procedure. The second, including the deprivation of the Trustee and the Court and the creditors of their control over and their rights in the Commuter Service for the extended period of two years. This and other problems remain for further consideration. However, and as I've said, the labor protection plan is the central issue of this morning's argument and this morning's determination, and it is enough to warrant the intrusion of the Court into this implementation of this statutory program on constitutional grounds.

I have no lack of faith in the ability of the Seventh Circuit to decide the constitutional issues here. My reservations, however, are as to the procedural anomalies which this statute embodies, setting the matter, apparently in the interest of speed and expedition, upon an exceedingly fast track, which puts a bankruptcy matter in the hands of the I.C.C., expert by definition only in terms of railroad operations, and bypasses the Court which has the primary jurisdiction over bankruptcy matters. The Seventh Circuit, in any event, will review this matter one way or another, and I would not wish it otherwise, but it will only be after an order of this Court barring the intent of this legislation to impose this significant obligation on a bankrupt estate with a statute by-passing the jurisdiction of the Bankruptcy Court in which the case is pending.

Let me comment for a moment on some of the arguments that have been made in opposition to the application of the creditors

and the Trustee. Mr. Broadley and Mr. Rush have argued that it would be appropriate for the Court to let the Trustee respond to the I.C.C.'s request for information, allowing the Commerce Commission to thus formulate the issues and work out a labor protection plan which in the argument of Mr. Broadley, I think it was, might be acceptable to the Court and the Trustee. I know that was Mr. Rush's argument. It might even be much less than the $75 million, it might be $50 million or $25 million. The issues [*sic*] is not whether the I.C.C. can arrive at a labor protection plan which the creditors and the Trustee could live with, even if that plan were to cost the Estate only $1 million. The issue is whether ab initio, the concept of a compelled labor protection plan, paid for out of the Estate, whatever the plan, has any constitutional sanction. We don't have to wait for an I.C.C. determination of the details of the plan to determine that issue.

Mr. Broadley has argued the Lowden case, the Old Rock Island case, a reorganized railroad continuing operations, and that, of course, that phrase, "Continuing operations," is the reason why the Lowden case is not applicable here. In its continuing operations after its earlier reorganization, those continuing operations invoked the continuing jurisdiction of the Commerce Commission. The uniqueness of the situation here is that the Rock Island is not a railroad corporation any longer, it's not an operating railroad, it's a corporation in the business of liquidating real estate and equipment and paying off creditors. The environment of labor protection decisions and precedent and all of the Court's decisions and precedent flowing therefrom has always been the environment of an operating railroad, and that is singularly the environment we no longer have here.

Mr. Clarke argues that there is no more public interest, or there is no more public interest here because, at least within the discretion of the Court, because the legislature, the ultimate repository of decisions on public interest, has spoken and decided what the

public interest is. If Congress sees public interest, of course, Congress may serve that public interest by appropriate legislation which does so with public funds. One of the central issues in this case is and always has been and will be and will continue to be to what extent the private sector, here the creditors and the bondholders, can be saddled with the public interest. Congress may determine public interest, but Congress may not take private property to serve the public interest.

I find that we have an emergency here, there is irreparable harm to the Rock Island and the creditors if this procedure mandated by the Rock Island Act goes forward, that the probability of determination of unconstitutionality of this Act after more mature consideration and deliberations is exceedingly great, and that all the statutory and traditional requirements for emergency relief have been met. The emergency relief sought in the petition before me in Paragraph 1 is a temporary restraining order and a preliminary injunction restraining the Commission from asserting jurisdiction to consider or impose labor protection arrangements as provided by the Rock Island Act; an order on the Trustee not to enter into these negotiations as provided by the Act and requested by the Commerce Commission; and a preliminary injunction restraining the United States Secretary of Transportation from going ahead with the statutorily authorized $75 million loan and consequent obligations on the Rock Island that would flow out of the making of that loan.

Because of the apparent unconstitutionality of this Act, I think this relief is warranted, and its effectuation and implementation must be enjoined, and therefore I will enter an order granting the prayers for relief that I have just summarized in the petition of the Rock Island Railroad, Trustee and the creditors. This is a preliminary injunction, I see no need for a temporary restraining order. I think in the issue of constitutionality of an Act, which we can all read and argue, a temporary restraining order is not

necessary and a preliminary injunction is the order I intend to enter. This, among other things, opens the avenue of appealability, which I think is probably desirable in this case.

I will continue the matter for further argument and further report on the preliminary injunction and for a determination of whether, after I hear whatever additional you have to present, it should be transmuted into a permanent injunction, a final injunctive order and will grant some time for that. I would expect, however, that before that time there will be a movement in the direction of the Court of Appeals, which is why I have made it a preliminary injunction and an appealable order.

I think the way to finalize this is to draw an order which merely contains the prayers for relief in the plaintiff's motion for a preliminary injunction, which I have indicated I'm ready to grant, so I will merely dictate an order which will be available to you gentlemen before the end of the day embodying those three requests for relief and putting them in order form rather than in prayer form.

Is there anything further, gentlemen, that remains to be done?

MR. CLARKE: Your Honor, there's one matter, and that's a question of whether or not in light of the fact that there is no money needed from the Estate for the next 20 days at least, that your Honor stay your order at this time to allow the Interstate Commerce Commission to consider the issue under Section 106(b) of the Act.

THE COURT: Well, actually that's been the thrust of the argument, Mr. Clarke, and Mr. Broadley, Mr. Rush having argued that no harm will be done by the implementation of this Act, and I have not agreed with that, I don't share their views on the subject. I think that the Act is designed, despite argument to the contrary, to take jurisdiction over this matter away from the Bankruptcy

Court, that the Commission is to make its determinations appealable only to the Court of Appeals, that I have no role in that and I think that's one of the unconstitutional aspects of the statute. It has been argued that when all of this has been done, the Trustee will have to come to me for an order approving whatever it is that the Commerce Commission has told him to do. I do not so read the Act, I don't think that's what it says, and therefore to grant your request would merely be to allow to go forward what I have just enjoined, and therefore I deny that motion.

Mr. Broadley, what—

MR. BROADLEY: I was just going to join him in a motion for a stay.

THE COURT: I'll deny the motion for a stay. Gentlemen, I'll get an order out as quickly as I can so all of you have something to go to the Court of Appeals with.

Counsel, you arrived belatedly and you haven't heard most of this. What have you got today?

MR. SCHNEIDERMAN: Your Honor, as I read the draft T.R.O. that was in the papers that we received on Friday afternoon, and as I heard your Honor's statement of what the order would be, do I understand that there is nothing in that order, either requested or entered, that effects the Commuter Service immediately?

THE COURT: That's correct, counsel. I adverted to the fact that that aspect of the statute might be subject to some further scrutiny, but there's not [*sic*] order affecting the Commuter Service entered at this time.

MR. SCHNEIDERMAN: Thank you, your Honor.

THE COURT: Thank you. That will be all, gentlemen.

APPENDIX D

PRELIMINARY INJUNCTION
JUNE 9, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Debtor,* WILLIAM M. GIBBONS, as Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; and HENRY CROWN, et al., *Plaintiffs,* *v.* THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, *Defendants.*	No. 75 B 2697

PRELIMINARY INJUNCTION

This matter is before the court on the joint motion of the trustee and creditors of the estate of the Chicago, Rock Island and Pacific Railroad Company. The trustee and creditors have filed a com-

plaint for a declaratory judgment and injunctive relief declaring the Rock Island Railroad Transition and Employee Assistance Act ("the Rock Island Act") (a copy of which is found in H.R. Rep. No. 96-1041, _____ Cong. Rec.-House, H3875 (May 20, 1980)) unconstitutional and enjoining its enforcement. The court has reviewed the complaint and motion and their supporting documents and memoranda. In addition, the court has heard arguments of all interested parties.

Pursuant to the requests for relief in the written filings and the arguments of counsel, the court made oral findings from the bench at the conclusion of the arguments heard this day. Those findings need not be restated here. However, pursuant thereto, the court orders the issuance of a preliminary injunction:

1) preliminarily enjoining the Interstate Commerce Commission from asserting jurisdiction to consider or to impose any labor protection arrangement or obligation under the Rock Island Act; and

2) preliminarily enjoining the Trustee, William M. Gibbons, from entering into negotiations respecting any labor protection agreement and from implementing any such labor protection agreement under the Rock Island Act; and

3) preliminarily enjoining the United States Secretary of Transportation from requesting, approving or guaranteeing any loan or obligation on the estate of the Chicago, Rock Island and Pacific Railroad Company under the provisions of the Rock Island Act.

ENTER:

FRANK MCGARR
United States District Judge

Dated: June 9, 1980

APPENDIX E

EXCERPTS FROM THE TRANSCRIPT OF PROCEEDINGS JUNE 20, 1980

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF: CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, *Debtor.*	No. 75 B 2697

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled matter before the HONORABLE FRANK J. MCGARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, the 20th day of June, 1980, at the hour of 10:00 o'clock a.m.

* * *

THE COURT: The circumstances of this case, in its leaping from crisis to crisis, which seems to be its history, has frequently compelled the litigants to come in, as they did earlier this week, and also as they did last week and today, in order to address emergencies where there is very little time involved, and that has necessarily compelled me to respond in kind, so that I'm constantly issuing opinions orally from the bench after listening to arguments of counsel and after a brief chance, usually overnight, to read some of the very excellent briefs that I've been supplied with.

It occurs to me that I should be embarrassed that every record that goes to the Court of Appeals, instead of presenting what I would hope to be my reasoned and literate opinion, is going up sort of off the cuff on findings and conclusions that the circumstances mandate. But, I guess that's the way it has to be.

In order to illuminate, as best I can, the reasons for the ruling which I intend to announce on this motion, I'd like to make some general comments both on the background of the issue and the issues themselves as they're raised.

I did this the last time, I don't know how well it turned out, but, as I said, the exigencies of time are such that it seems to be the best way to do it.

I've heared a lot of reference today, and always in this case, to the public interest, and Mr. Clarke now argues that it was in the public interest to avoid the harsh consequences upon those terminated employees of the Rock Island which he sees implicit in my order. And it's the argument of the Government that the public interest, which lies generally in the capable hands of the Commerce Commission, is where the public interest should remain and that they should obey the mandate of Congress and implement the plan which Congress so obviously in the public interest wants them to do.

The creditors have listened to the public interest argument for five years and I imagine they grew fairly tired of it fairly early in the game, because, as always, I have tried in this case to balance the public interest against the private rights of the creditors, and one must do that in a case involving a public utility such as a railroad, and which one never does in any other type of a bankruptcy case because it's so extraordinary that it can be argued that the private right of contract can be effected by the public interest to the extent that it has been in this case.

But, the public interest has many aspects. There was always, in the long life of this case, a strong public interest in the continued operation of the Railroad. We came to a time in the case when even the Commerce Commission abandoned that, as did I.

There has always been an employees' interest. No court ever takes lightly the signing of an order, the issuance of an order that

threatens unemployment of a very large number of people, so the employees' interest has been determinative and paramont, and that combination of the public interest and the employees' interest gave the Rock Island five years of operation and the employees five years of employment, which had a different view been taken of the public interest vis a vis the creditors' interest, they might not have had.

As to the creditors' interest, which is contrary to the public interest in this case, we have reached that stage in the administration of the Rock Island where since it's no longer an operating Railroad, it's the creditors' interests that are now paramont and must be served.

I'd like to characterize those creditors for a moment. We are tempted to think of the creditors in this case, because they have been active in the case as banks and bondholders and so forth, but my desk is piled high with letters that I have been receiving for many, many months from small businesses and small taking [taxing] authorities and school districts and from all through the Middle West and the area that the Rock Island serves, telling tales of extreme hardship that have been occasioned by the failure and inability of the Rock Island to pay its bills. These are not giants, they're not banks. They're people upon whom the hardships of the abandonment of the service of the Rock Island and its bankruptcy falls every bit as harshly as the same problems fall on the employees.

What I'm really trying to say, I suppose, is that everyone in this case, as is natural and as is human, approaches it from a single point of view, and I am charged with and have tried hard to see every issue in this case in the light of all of these interests and points of view which I have just discussed.

The statute that we're dealing with today, the Rock Island Transition Act, to give it a shorthand name, exudes concern for

expedition, and it is in that atmosphere that this entire proceeding concerning it has taken place. We have moved rapidly, we have tried to do things rapidly and set up possibilities of appeal rapidly for the reason that the issues are vital and important and all these interests are involved and rapid determination of what must be determined seemed to be in order.

In the order that is the subject of today's petition, I did not, in so many words, adjudicate the unconstitutionality of the Rock Island Transition Act, although my remarks indicated that I certainly believed that it was probably that that would be the ultimate conclusion of the Court were we to go down the route to the final injunctive order. But, I did enter a preliminary injunction prohibiting its implementation on the grounds that we had a genuine emergency, that we had irreparable injury and that we had a reasonable probability of the plaintiffs' success on the arguments as to the unconstitutionality of the Act, in both its substance and in the procedures which it set up.

The unconstitutional aspect of the taking of private property to fund a legislatively created special benefits program for the terminated employees remains, in my mind, after all the argument that I have heard today, still the most single valid constitutional argument addressed to the Rock Island Transition Act. The Rock Island as an operating railroad was suffused with the public interest. But, the Rock Island as a non operating former railroad has lost that character, and therefore, Congress, their approach to it, to the public interest seems to me to misapprehend the fact that what they are dealing with is a private business with a lot of creditors which own some property and which is being liquidated for the benefit of creditors, and that it is not an operating railroad and that the public interest is no longer paramont and that the employees of the railroad, regrettable as it is, are former employees of the Railroad.

Among the rationals that have been developed to justify Government intervention into railroading over the years has been the public interest and peaceful labor relations, and the public interest in the necessity to keep an operating railroad operating. The operating railroad aspect is now gone as a factual basis for the interest of Congress, and if Congress had a sufficiently legitimate public interest in peaceful labor relations, as it asserts, and as it has been argued, as a foundation for what it has done, nothing justifies Congress satisfying the public interest in peaceful labor relations by the taking of private property. The public interest, if it is a real public interest, must be served by public funds.

Mr. Clarke has argued that the money should be paid, the money provided by Congress and by this Act to come from this Estate, that it should be paid to the employees while the legal process goes foreward [*sic*], and he argues that with some considerable persuasion. But in truth, the argument that the funds, if improperly paid, are recoverable under the Tucker Act is a specious argument and if the money is paid to the employees while the legal processes go foreward [*sic*] and if the constitutionality of the Act, or my decision on it, was correct, there is no doubt that there has been irreparable harm to the Estate of the Rock Island.

Neither is it certain in my mind that as a matter of law that I have the final and total control over the disbursement of the funds, as the Government argues, and therefore, I cannot accept that argument as a reliable predicate for the Court's conclusion that there is no irreparable harm possible in this case, because ultimately I will have the last say as to the disbursement of the funds.

With everybody concerned with expedition and everybody arguing for speed, it seems to me that it doesn't matter very much whether the constitutionality of this Act, which is the basic issue we're all concerned with, is adjudicated in the context of an appeal

from my order of a week or so ago, or, as Mr. Rush would have it, after the I.C.C. implements the order and the Rock Island comes to me for an authorization to disburse the funds, which I might be expected to deny if I had the same opinion on constitutionality then as I do now. Or, as Mr. Clarke argues, that after the I.C.C. implements the program and gets set to disburse the funds, that if we handle the appeal expeditiously enough, we may get an order out of the Appellate Court before we get the money out of the Rock Island.

All of those programs and all of those paths lead to the same conclusion, and that is the absolute necessity in the present posture of this case for an appellate determination of the validity of my tentative preliminary conclusion that the Act we are discussing is unconstitutional, and in a pragmatic way, it seems obvious to me that the best way to handle that is in an appeal from the order which I have already entered. The fastest way to resolve it is also in that appeal, and I suppose that's why it's the best way.

It is argued, and the Government is understandably concerned that there is confusion as to where that appeal should go, do we have a Seventh Circuit matter, or do we have a Supreme Court matter. I must confess that the issue is confusing to me and I'm not certain, although I'm sure that you gentlemen have given it much more study and thought than I have.

This is a problem created, however, by the Act itself, as I view it, in its attempt to tamper with the ordinary appellate process, and I say that Congress having created this problem, it leaves me no avenue to resolve it.

In summary, I think since Congress desired expedition here, I have raised questions as to the constitutionality of the legislative plan. The objectors say that there is no irreparable harm, and I disagree with them. If the Act is unconstitutional now, it will be

no less unconstitutional after the I.C.C. implements its plan or after the funds are disbursed, if that's the way that it turns out, and I assume, therefore, that expedition is best served by an appeal from the order that I entered most recently and to allow the appellate determination from there.

So, with some considerable expression of sympathy for the employees of the Rock Island, and concern, and while I don't expect them to accept this, since nobody believes that you tell them something they don't want is for their own good, that even from the employees' point of view the most expeditious course is the one that I have just described and I have just announced.

Therefore, the motion of Messrs. Broadley, Rush and Clarke, or the motion joined in by all of them to vacate the injunctive order of June 9th is denied.

I guess that leaves you on your way to whatever court of appeals you decide you're going to, gentlemen. At least I hope you stay in touch with each other so you meet in the right court.

That will be the order on today's hearing.

MR. CLARKE: Your Honor, would it be possible to just ask one or two questions for clarification?

THE COURT: I'll do my best.

MR. CLARKE: Your Honor, am I correct in concluding that your Honor has concluded tentatively and it's that finding, the tentative finding of law that is the basis of your injunction that the statute is unconstitutional insofar as it requires the taking from the Estate?

THE COURT: It is unconstitutional for more than one reason, and that's one of them.

MR. CLARKE: So we do have a finding on the constitutionality?

THE COURT: Yes. All right, gentlemen—

MR. RUSH: Might I ask a question also, your Honor?

THE COURT: All right.

MR. RUSH: There's been so much argument about it that it becomes a matter of increasing concern as to whether in your June 2nd order you did in fact, as has been argued, intend to rule that the imposition of any labor protection on the Estate could not be done constitutionally, or whether—I guess I simply understood it as you simply held it wasn't required under Section 17 of the Milwaukee Restructuring Act.

THE COURT: I held originally that it was not required under Section 17 of the Milwaukee Restructuring Act. I added, and you have to always bear in mind that it was in the context of the ruling on an application for preliminary relief, that it was my view that it was highly probable that the final outcome of the case would be that any imposition of labor protection by Congress on the Rock Island payable out of the Estate was an unconstitutional taking.

MR. RUSH: Thank you, sir.

THE COURT: All right, gentlemen.

(Which were all of the proceedings had in the above-entitled matter on the day and date aforesaid.)

APPENDIX F

EXCERPTS FROM THE TRANSCRIPT OF PROCEEDINGS OCTOBER 7, 1980

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of: CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, *Debtor.*	No. 75 B 2697

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause, before the HONORABLE FRANK J. MCGARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Tuesday, October 7, 1980, at the hour of 2:00 o'clock p.m.

* * *

THE COURT: I think I should make some comments on this.

As has been pointed out, it is in effect, a discussion of problems created by a law that is not yet a law but which will very probably become one soon. For that reason, I think the discussion is appropriate.

What I have before me, to be more precise about it, is motions by three parties to vacate a preliminary injunction, which I entered on June 9th, 1980. I have listened to the arguments on this. I have formed some tentative opinions. I don't really intend to rule on those motions because everybody is entitled to a little more chance to develop the matter with themselves and with me, and, of course, we should wait until it becomes a reality. I think these observations of mine are pertinent only because of the suggestion of Mr. Rush that I might find his position so appealing that I

would agree now that the Commerce Commission is correct in regarding my former injunctive order as not binding upon them because this is in effect new and different legislation. I want to make my position clear so that there is no misunderstanding between myself and Mr. Rush and/or the Commission.

Actually, as has been adverted to, the basic vice of the Act which I held unconstitutional was the imposition of the cost of the Rock Island Rehabilitation Act on the Estate and thus on the creditors. I issued a preliminary injunction basically because I found the Act unconstitutional and thought it was my duty to enjoin the carrying out of the programs set forth by Congress seeking the unconstitutional goals that I found.

We had discussions of whether a preliminary injunction was issuable, and we discussed the traditional irreparable injury concept that goes with that determination. I did issue the preliminary injunction accompanied by a finding, among other things, that there was irreparable injury. The bill, as I now see it, amends and attempts to cure some of the procedural problems with the Act which was before me in an effort to remove the irreparable injury argument concerning the old Act. The new bill does not address the basic finding of the Court that the whole program which has been changed only cosmetically, to borrow somebody else's word, was an unconstitutional deprivation. I held that and an appeal is in progress. The argument that the Tucker Act is available and therefore we could go ahead with the unconstitutional taking because the Tucker Act will allow everything to turn out in the end really does not impress me. I share Mr. Moritz' comment, or argument, that you do not proceed, nor must the Court allow proceedings under what is patently unconstitutional legislation because there is a remedy somewhere down the line that may straighten things out. It really is not at all clear to me that to disperse the money now, to allow the claim against the assets of the Rock Island to accrue, to say to the Trustee that if this is all un-

constitutional you can sue under the Tucker Act and get it back, is even to cure the irreparable harm argument. Mr. Murray argued that the very fact of the existence of the $75 million lien on the assets of the Rock Island is irreparable injury as it overshadows the efforts of the Trustee to continue the liquidation process relying, as he must, on the ability and willingness of people to extend credit under cost of administration terms.

So, as I said, my initial impression without ruling on it is that the new bill does not cure the old problem.

Mr. Rush asks me to agree that it is new legislation so that the old injunction, which he has moved to vacate is no longer binding on the Commission, and I would like to make it clear that I do not agree. This is not new legislation in my view. This is amended legislation which attempts, but fails, to clear the underlying flaws which caused me to find the bill unconstitutional in the first place. It remains basically the same law with the same defects and is subject to the same injunction. So, while I am not ruling on the motion to vacate the injunction because I would like the parties to have an opportunity to develop the matters as fully as they wish before me, I am making these comments to make it clear that I do not agree with the Commerce Commission's suggestions that the injunction is no longer binding on them.

I think what we had better do, gentlemen, is to allow the various people opposing the motion to file some very quick responses, and then give Justice, the Commerce Commission and Mr. Clarke an opportunity to reply so that they will have a chance to air their views on it.

APPENDIX G

ORDER OF THE UNITED STATES DISTRICT COURT OCTOBER 15, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,

Debtor,

WILLIAM M. GIBBONS, as Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; and HENRY CROWN, et al.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation,

Defendants.

No. 75 B 2697

PRELIMINARY INJUNCTION

This matter is before the court on the motion of intervenor Railway Labor Executives Association ("RLEA"), requesting this court [to] vacate the preliminary injunction issued on June 9, 1980, enjoining enforcement of sections 106 and 110 of the Rock

Island Transition and Employee Assistance Act ("Rock Island Act" or the "Act"), 45 U.S.C. §§1005, 1008, on the grounds that all constitutional defects have been remedied by passage of the Railroad Transportation Policy Act of 1980 ("Staggers Rail Act of 1980"), H.R. Rep. 1430, 126 Cong. Rec.-House 9892 (Sept. 29, 1980). The trustee and certain creditors also seek a declaratory judgment and injunctive relief declaring the Rock Island Act as amended by the Staggers Rail Act, unconstitutional and enjoining its enforcement. In anticipation that the Staggers Rail Act would be signed into law, the court heard arguments on October 7, 1980, from all interested parties, addressed to the effect of the Staggers Rail Act on the court's preliminary injunction.

This court issued a preliminary injunction on June 9, 1980, when, based upon findings of fact and conclusions of law delivered from the bench, the court concluded that "the probability of determination of unconstitutionality of this Act after more mature consideration and deliberation is exceedingly great. . . ." Transcript of Proceedings, June 9, 1980 at 81. Specifically, the injunction prevented the Interstate Commerce Commission and the Secretary of Transportation from imposing a $75,000,000 loan with cost of administration status on the bankrupt estate. These proceeds were to fund a labor protection arrangement created under the Act. This determination was based upon the court's finding that the provisions of the Act mandated a taking of private property of the estate without compensation, in violation of the fifth amendment.

On June 28, 1980, United States Justice John Paul Stevens denied RLEA's motion for a stay of this court's injunction.

The Staggers Rail Act became law on October 14, 1980. It amends certain provisions of the Rock Island Act and re-enacts the labor protection obligations previously found unconstitutional by this court. The re-enacted labor protection requirements

appear to be essentially the same as under the original Act except that the time available for the trustee and the Commission to respond is shortened and the anti-stay provisions of section 106 have been eliminated.

This court has studied the Staggers Rail Act amendments to the Rock Island Act, has reviewed carefully the arguments of counsel, the documents filed by the various parties, the ruling of June 9, 1980, and the court's knowledge of these proceedings, and it remains clear that the Rock Island estate continues to be exposed to irreparable injury by the provisions of the Rock Island Act as amended by the Staggers Rail Act. The Staggers Rail Act does not cure the defects found in the Rock Island Act. Like its predecessor, the Staggers Rail Act imposes a $75,000,000 cost of administration claim on the Rock Island estate with priority over claims of general creditors and shareholders on the assets of the estate.

Petitioner argues that the statutory scheme can be implemented, the money disbursed, and the validity of the program and extent of the Rock Island liability to finance it, later litigated. This, in fact, cannot be done without irreparable injury to the administration of the estate for the benefit of the creditors. The trustee is currently liquidating assets and preparing the plan for distribution to creditors. Under court order, the trustee is also preparing an interim plan for the immediate partial satisfaction of cost of administration claims. The imposition of a $75,000,000 uncertainty on the estate will totally halt the liquidation for the long period consumed by the appellate process, with irreparable injury to the already long-suffering creditors. Further, the whole liquidation plan will be distorted by the brooding omnipresence of a potential liability representing a significant percentage of the total assets.

Pursuant to the requests for relief in the written filings and arguments of counsel, the court orders the issuance of a preliminary injunction.

1) The Rock Island Act as amended and re-enacted by the Staggers Rail Act effects an unconstitutional taking of private property in violation of the rights of the Rock Island estate, its creditors and shareholders which are secured by the Fifth Amendment of the United States Constitution.

2) The implementation of this Act will constitute irreparable harm to the estate.

3) The court's injunction of June 9, 1980 remains in full force and applies to sections 106 and 110 of the Rock Island Act, as amended and re-enacted by the Staggers Rail Act.

4) The court orders the issuance of a preliminary injunction:

a) preliminarily enjoining the Interstate Commerce Commission from asserting jurisdiction to consider or to impose any labor protection arrangement or obligation under the Rock Island Act as amended and re-enacted by the Staggers Rail Act; and

b) preliminarily enjoining the trustee, William M. Gibbons, from entering into negotiations respecting any labor protection agreement and from implementing any labor protection agreement under the Rock Island Act as amended and re-enacted by the Staggers Rail Act; and

c) preliminarily enjoining the United States Secretary of Transportation from requesting, approving or guaranteeing any loan or obligation on the estate of the Chicago, Rock Island and Pacific Railroad Company under the provisions of the Rock Island Act as amended and re-enacted by the Staggers Rail Act.

ENTER:

FRANK J. MCGARR

United States District Judge

DATED: October 15, 1980

ORDER OF THE UNITED STATES DISTRICT COURT OCTOBER 16, 1980

The Preliminary Injunction entered October 15, 1980 is hereby corrected as follows:

1) p. 1, lines 1 and 2 [p. b-1, lines 1 and 2 and first two words of line 3] should read: "This matter is before the court on the motion of intervenor Railway Labor Executives Association ('RLEA'), joined by the United States and the Interstate Commerce Commission, requesting this court. . . ."

2) p. 3, line 13 [p. b-3, lines 14 and 15] should read: ". . . Island estate with priority over claims of creditors and. . . ."

3) p. 4, line 4 [p. b-3, line 32] should read: ". . . arguments of counsel, the court orders the continuance of the preliminary. . . ."

4) p. 4, line 16 [p. b-4, line 11] should read: "4) The court orders the continuance of the preliminary injunction: . . ."

Supreme Court, U. S.
FILED
DEC 24 1980
MICHAEL RODAK, JR., CLERK

No. 80-415

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant,

v.

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; HENRY CROWN, et al.; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL P. GOLDSCHMIDT, Secretary of Transportation,
Appellees.

On Appeal From The United States District Court For The Northern District Of Illinois, Sitting As A Railroad Reorganization Court

SUPPLEMENT TO MOTION TO AFFIRM

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No. 80-415

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

RAILWAY LABOR EXECUTIVES' ASSOCIATION,

Appellant,

v.

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; HENRY CROWN, et al.; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL P. GOLDSCHMIDT, Secretary of Transportation,

Appellees.

On Appeal From The United States District Court For The Northern District Of Illinois, Sitting As A Railroad Reorganization Court

SUPPLEMENT TO MOTION TO AFFIRM

Appellees William M. Gibbons, the Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor, Continental Illinois National Bank and Trust Company of Chicago and The First National Bank of Chicago, as Indenture Trustees, and Henry Crown, et al., file this supplement to their Motion To Affirm the judgment of the district court in the above-captioned appeal.

This supplemental brief is filed to advise this Court of the decision of the United States Court of Appeals for the Seventh Circuit, dated December 16, 1980.[1] In that decision, the court of

[1]Although the decision was dated December 16, 1980, it did not become known to appellees until December 18, 1980, one day after they had filed their Motion to Affirm.

appeals, equally divided, affirmed the October 15, 1980 order of District Judge Frank J. McGarr which continued in effect his earlier order enjoining implementation of the labor protection scheme of the Rock Island Transition and Employee Assistance Act. See Appendix H hereto, *In re Chicago, Rock Island & Pacific Railroad Co.*, Nos. 80-2487 and 80-2536 (7th Cir. Dec. 16, 1980) (unpublished order).[2]

For the reasons stated in the Motion to Affirm filed by appellees on December 17, 1980, appellees again respectfully request that this Court note probable jurisdiction of this appeal and affirm the district court's order of June 9, 1980.

Respectfully submitted,

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December 22, 1980

[2]The court of appeals also denied the motion to dismiss filed by appellees. See Motion to Affirm 3, n. 3. For the reasons stated in appellees' Petition for a Writ of Certiorari at 8-16, *Gibbons* v. *Railway Labor Executives' Ass'n*, No. 80-704 (U.S., *petition for cert. filed* Oct. 30, 1980), appellees argued that Congressional forum-shopping should not be permitted where an appeal pends in this Court and thus that jurisdiction did not lie in the court of appeals.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
(ARGUED *EN BANC* NOVEMBER 13, 1980)
DECEMBER 16, 1980.

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge**

In the Matter of:

CHICAGO, ROCK ISLAND and PACIFIC RAILROAD COMPANY,

Debtor,

Nos. 80-2487 and 80-2536

Appeals of:

RAILWAY LABOR EXECUTIVES' ASSOCIATION; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; AND NEIL GOLDSCHMIDT, United States Secretary of Transportation,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

No. 75 B 2697

FRANK J. MC GARR, *Judge.*

ORDER

This is an appeal from an order entered by the district court October 15, 1980, continuing in effect a preliminary injunction issued June 9, 1980; the injunction bars the Interstate Commerce Commission, the United States Secretary of Transportation, and the Trustee of the Debtor from complying with the labor

*Circuit Judges Walter J. Cummings and Wilbur F. Pell, Jr. did not participate in the *en banc* hearing.

protection requirements of Rock Island Transition and Employee Assistance Act, as amended by the Staggers Rail Act.

We heard the matter *en banc* pursuant to the Staggers Rail Act. Those circuit judges in regular active service who deem themselves disqualified did not participate. We took with the case a motion to dismiss on the ground that the issue is pending before the Supreme Court, an appeal having been taken from the injunction of June 9, 1980 before enactment of the Staggers Rail Act.

We all agree that in view of the Staggers Rail Act the motion to dismiss the appeal should be DENIED, and IT IS SO ORDERED.

On the merits, Judges Fairchild, Sprecher, and Cudahy voted to reverse the order appealed from. Judges Swygert, Bauer, and Wood voted to affirm.

The Court being equally divided, the order appealed from is necessarily AFFIRMED.

IT IS SO ORDERED.

Supreme Court, U.S.
FILED
NOV 26 1980
MICHAEL RODAK, JR., CLERK

No. 80-415

In the Supreme Court of the United States

OCTOBER TERM, 1980

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
APPELLANT

v.

WILLIAM M. GIBBONS, TRUSTEE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-415

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
APPELLANT

v.

WILLIAM M. GIBBONS, TRUSTEE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE FEDERAL APPELLEES

QUESTION PRESENTED

Whether the employee protection provisions of the Rock Island Railroad Transition and Employee Assistance Act, Pub. L. No. 96-254, 94 Stat. 399, as they existed prior to amendment by the Staggers Rail Act of 1980, Pub. L. No. 96-448 (Oct. 14, 1980), imposed an unconstitutional taking of property in violation of the Just Compensation Clause of the Fifth Amendment.

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OPINIONS BELOW

The district court's oral opinion (J.S. App. 5a-12a) and order (J.S. App. 13a-14a) of June 9, 1980, and its oral opinion (J.S. App. 15a-22a) of June 20, 1980, denying a motion for reconsideration, are not reported. The district court's order of October 15, 1980 (App. C, *infra*, 9a-13a), and minute order amending that order (App. D, *infra*, 14a), are not reported.

JURISDICTION

The district court's order holding unconstitutional portions of the Rock Island Railroad Transition and Employee Assistance Act, Pub. L. No. 96-254, 94 Stat. 399, and preliminarily enjoining enforcement of those portions of that Act, was entered on June 9, 1980. The notice of appeal was filed on June 11, 1980 (J.S. App. 23a), and the appeal was docketed on September 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

STATUTES INVOLVED

Sections 106 and 110 of the Rock Island Railroad Transition and Employee Assistance Act, as originally enacted, Pub. L. No. 96-254, 94 Stat. 401 and 403, are set forth at J.S. App. 1a-3a. Section 701 of the Staggers Rail Act of 1980, Pub. L. No. 96-448 (Oct. 14, 1980), which amends Section 106 and adds Section 124 to the Rock Island Railroad Transition and Employee Assistance Act, is set forth in Appendix A, *infra*, 1a-4a.

STATEMENT

1. In March 1975, after experiencing several years of financial deterioration, the Chicago, Rock Island and Pacific Railroad Company ("Rock Island") peti-

tioned the United States District Court for the Northern District of Illinois for reorganization under Section 77 of the Bankruptcy Act, 11 U.S.C. 205. The Rock Island continued to operate for more than four and a half years under the protection of Section 77. After a strike further damaged its financial posture, however, the Rock Island ceased all operations in September 1979.

In January 1980, the reorganization court directed the Trustee of the Rock Island to prepare a plan for its liquidation, and the Trustee began selling the assets of the railroad on a piecemeal basis. On June 2, 1980, the reorganization court authorized the Trustee to abandon the entire Rock Island system and ordered that no employee protection conditions be imposed.

On May 30, 1980, a few days before the reorganization court's abandonment order, the President signed into law the Rock Island Railroad Transition and Employee Assistance Act, Pub. L. No. 96-254, 94 Stat. 399 ("the Rock Island Act"). Sections 106 and 110 of the Rock Island Act, 94 Stat. 401 and 403 (J.S. App. 1a-3a) required the Trustee, through the use of high priority federal loans, to provide labor protection benefits of up to $75 million to employees of the Rock Island who might be adversely affected by its cessation of operations. Specifically, Section 106(b) of the Rock Island Act, 94 Stat. 401, ordered the Interstate Commerce Commission to impose a fair and equitable labor protection arrangement within 30 days unless, prior to that time, the railroad and labor organizations representing its employees were able to agree upon a satisfactory arrangement. Section 106(c), 94 Stat. 401, provided that the bankruptcy court should immediately direct the Trustee and the labor organizations to implement the arrange-

ment. Section 106(d), 94 Stat. 401, provided that orders of the Commission or of the bankruptcy court under Sections 106(b) and (c) could not be stayed and that these orders could be reviewed only in the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit was required to rule on any such appeal within 60 days, and its decision would not be subject to further review. Section 106 (e)(2), 94 Stat. 402, provided that labor protection claims would be treated as administrative expenses of the Rock Island estate.

Section 110 of the Rock Island Act required the Secretary of Transportation to guarantee obligations of the Rock Island for the purpose of providing employee protection under an agreement entered into under Section 106. It further provided that the guaranteed obligations would be treated as an administrative expense of the Rock Island estate and that the United States would incur no liability except in connection with those obligations. The amount guaranteed by the Secretary, and the liability of the Rock Island under a labor protection agreement, were limited to $75 million.

2. After the enactment of the Rock Island Act, the National Mediation Board offered its assistance in negotiating an employee protection agreement. The Rock Island Trustee, however, declined to participate in negotiations. On June 5, 1980, the Trustee, the indenture trustees under the mortgages of the Rock Island and representatives of certain creditor interests filed a complaint in the bankruptcy court seeking a judgment declaring the Rock Island Act unconstitutional and enjoining its enforcement. After a hearing on June 9, 1980, the district court entered a preliminary injunction enjoining the Commission, the Trustee, and the Secretary of Transportation from

fulfilling their obligations under Sections 106 and 110 of the Rock Island Act (J.S. App. 13a-14a).

The district court explained its reasons for issuing the injunction in an oral statement from the bench (J.S. App. 5a-12a). Although the court suggested that the statute might have other constitutional problems, it based its ruling on the fact that the labor protection provisions constituted an unconstitutional taking of the property rights of the creditors, in violation of the Just Compensation Clause of the Fifth Amendment (*id.* at 7a-8a). The court concluded that if the procedures of the labor protection provisions of the Rock Island Act were permitted to go forward, the creditors of the estate would suffer irreparable harm (*id.* at 9a-10a). Therefore, the court enjoined (i) the Trustee and representatives of affected employees from entering into negotiations respecting a labor protection agreement; (ii) the Commission from considering the imposition of any such agreement; and (iii) the Secretary of Transportation from guaranteeing any loans or obligations of the Rock Island under the Rock Island Act (*id.* at 13a-14a). On June 20, 1980, the court denied a motion for reconsideration filed by the Railway Labor Executives' Association ("RLEA"), the United States and the Commission, again explaining that the labor protection provisions of the Rock Island Act constituted an unconstitutional taking (*id.* at 18a-19a).

Because the district court had interrupted the procedures established by the Act before a labor protection plan could be devised, an expedited appeal to the Seventh Circuit, as contemplated by Congress, could not be taken.[1] Therefore, RLEA, the United

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[1] The judicial review provisions of Section 106(d) covered appeals of orders entered under Sections 106(b) and (c),

States, and the Commission filed notices of appeal to this Court pursuant to 28 U.S.C. 1252. RLEA, supported by the United States and the Commission, sought a stay of the preliminary injunction from Mr. Justice Stevens in order to allow the procedures mandated by the Rock Island Act to go forward pending a determination of its constitutionality. On June 28, 1980, Mr. Justice Stevens denied the application. *Railway Labor Executives' Association* v. *Gibbons*, No. A-1135. Mr. Justice Stevens stated that the district court was "probably correct" in finding that the labor protection provisions of the Rock Island Act would constitute a taking of the estate's property. Slip op. 5. Moreover, Mr. Justice Stevens rejected the argument that the estate would suffer no irreparable harm if labor protection payments were made and the Rock Island Act were later determined to constitute a taking, because he doubted that the creditors would have a remedy against the government by a suit in the Court of Claims under the Tucker Act, 28 U.S.C. 1491: "[W]hile the Solicitor General suggests that a Tucker Act remedy *may* exist in the event of an unconstitutional taking, * * * it is obvious that his suggestion is equivocal" (slip op. 4-5).[2] The application for a stay was then resubmitted to the full Court, which denied the request on July 2, 1980, by a 5-3 vote.

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which did not come into play until a labor protection plan was devised.

[2] The language of Section 110(e) of the Rock Island Act, 94 Stat. 403, suggested the possibility that Congress intended to withdraw the Tucker Act remedy for claims regarding these labor protection payments. See *Railway Labor Executives' Association* v. *Gibbons*, *supra*, slip op. 2.

3. In response to the district court's injunction, Congress passed the Staggers Rail Act of 1980, Pub. L. No. 96-448, which was signed into law on October 14, 1980. Section 701 of the Staggers Rail Act (App. A, *infra*, 1a-4a) amended the Rock Island Act in a number of significant respects. Section 701 re-enacted the provisions of Section 106 requiring the Trustee to negotiate a labor protection agreement. However, the time for the parties to negotiate the agreement was shortened from 10 to five days, and the time for the Commission to impose a fair and equitable arrangement, in the absence of an agreement, was shortened from 30 to 15 days.

The judicial review provisions of Section 106(d) were also changed. The amended section no longer includes the prohibition against staying orders of the Commission or the bankruptcy court issued under the Rock Island Act or the bar to further review of the Seventh Circuit's decision. Moreover, the Staggers Rail Act added a new Section 124 to the Rock Island Act. This Section closed the jurisdictional loophole that had prevented the district court's decision from being appealed expeditiously to the Seventh Circuit, by providing that "[n]otwithstanding any other provision of law, any appeal from * * * any decision of the bankruptcy court with respect to the constitutionality of any provision of [the amended Rock Island] Act" must be taken to the Seventh Circuit, sitting en banc, and must be decided within 60 days.

The most significant change made by the Staggers Rail Act, however, was the addition of language clarifying Congress' intention that monies paid out by the estate could be recovered from the United States in the event that the employee protection provisions of the Rock Island Act were held to be a taking. Thus,

Section 110(e) of the Rock Island Act was amended to make explicit that the $75 million payment ceiling was a limitation on the liability of the United States to the employees of the railroad, not to the estate. And Section 124(c) was added to the Rock Island Act, providing:

> Nothing in this Act or in the Milwaukee Railroad Restructuring Act (45 U.S.C. 901 et seq.) shall limit the right of any person to commence an action in the United States Court of Claims under section 1491 of title 28, United States Code (commonly referred to as the Tucker Act).

4. On October 6, 1980, in light of the new statute, RLEA, and the United States, supported by the Commission, moved the district court to vacate its injunction of June 9, 1980.[3] The movants argued that the June 9 injunction applied to a statute no longer in existence and that the injunction had no application to the re-enacted, but nevertheless new and distinct, obligations concerning labor protection that the Staggers Rail Act imposed on the Commission and the other parties. In short, RLEA and the government contended that the passage of the Staggers Rail Act effectively mooted the June 9 injunction. Moreover, the movants argued that the Staggers Rail Act amendments eliminated the features of the original Rock Island Act that the district court had concluded would lead to irreparable injury unless enjoined—particularly by expressly providing that a Tucker Act remedy is available if the labor protection provisions are ultimately found to effect a taking

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[3] Although the Staggers Rail Act did not become law until October 14, 1980, the district court held a hearing on the motion on October 7, 1980 (see App. B, *infra*, 5a-8a), on the expectation that the President would sign the bill.

of property—and therefore that the procedures established in the Staggers Rail Act should be permitted to go forward.

On October 15, 1980, the district court denied the motion to vacate and issued a new injunction preventing the Commission, the Trustee and the Secretary of Transportation from taking any action respecting the labor protection provisions of the "Rock Island Act as amended and re-enacted by the Staggers Rail Act" (App. C, *infra*, 12a-13a). The court held that the "Staggers Rail Act does not cure the defects found in the Rock Island Act" (*id.* at 11a) and that "[t]he Rock Island Act as amended and re-enacted by the Staggers Rail Act effects an unconstitutional taking of private property" (*id.* at 12a). The Staggers Rail Act did not eliminate the likelihood of irreparable injury to the estate, in the court's view, because (*id.* at 11a-12a):

> The imposition of a $75,000,000 uncertainty on the estate will totally halt the liquidation for the long period consumed by the appellate process, with irreparable injury to the already long-suffering creditors. Further, the whole liquidation plan will be distorted by the brooding omnipresence of a potential liability representing a significant percentage of the total assets.

The court's order did not discuss the effect of the express provision of a Tucker Act remedy on the irreparable harm question. On October 16, 1980, the court *sua sponte* entered an order (App. D, *infra*, 14a) amending its order of the previous day by changing the phrase "the court orders the issuance of a preliminary injunction," which appears twice, to "the court orders the continuance of the preliminary injunction."

On October 16, 1980, the RLEA, and on October 29, 1980, the United States and the Interstate Commerce Commission, filed notices of appeal to the Seventh Circuit from the preliminary injunction issued on October 15, 1980.[4] The appeals were docketed as No. 80-2487, *In the Matter of: Chicago, Rock Island & Pacific Railroad Company.* The briefs on the merits of the appeal have been filed, and oral argument was held before the court, sitting en banc, on November 13, 1980.

On October 25, 1980, the Trustee filed a motion to dismiss the appeals to the court of appeals for lack of jurisdiction, arguing that because a direct appeal of the June 9, 1980, preliminary injunction had been taken to this Court pursuant to 28 U.S.C. 1252, jurisdiction over the appeal of the October 15, 1980, injunction must also lie in this Court. On October 30, 1980, the Trustee filed a petition for a writ of certiorari, asking this Court to review and affirm the district court's order of October 15, 1980, prior to judgment by the court of appeals. *William M. Gibbons, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor, et al.* v. *Railway Labor Executives' Association, et al.*, No. 80-704.

ARGUMENT

For the reasons stated by appellant (J.S. 8-17), the government believes that the jurisdictional statement raises a substantial federal question. However, because the Staggers Rail Act has effectively super-

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[4] Because the district court's order was a determination of the constitutionality of the Rock Island Act, as amended, Section 124(a) of that statute (App. A, *infra*, 1a) requires that the order be appealed to the Seventh Circuit.

seded the provisions of the Rock Island Act addressed by the June 9, 1980, injunction that is the subject of this appeal, the controversy raised by the appeal is now moot. Accordingly, the Court should note probable jurisdiction, vacate the judgment of the district court, and remand with directions to dismiss. *United States* v. *Munsingwear*, 340 U.S. 36, 39 (1950).

The injunction that appellant has asked this Court to review was entered by the district court on June 9, 1980, on the ground that the Rock Island Act, as originally enacted, was unconstitutional. With the passage of the Staggers Rail Act, the original Rock Island Act effectively has been repealed. The question presented by this appeal thus is purely an academic one—the constitutionality of a statute that no longer exists and that has no continuing consequences.

Of course, the Staggers Rail Act has replaced the original Rock Island Act with an amended version that still provides procedures for implementing a labor protection plan. But there is no merit to the district court's suggestion that these amendments to the Rock Island Act are merely "cosmetic" (App. B, *infra*, 6a). The district court's primary constitutional objection to the original Rock Island Act was that it constituted a taking without just compensation in violation of the Fifth Amendment. The court also intimated that possible constitutional problems were posed by the "strangely truncated appellate procedure" (J.S. App. 7a). These objections have been remedied completely by the recent amendments to the statute. The appellate procedure has been altered by the elimination of both the anti-stay provision and the limitation on further review following a decision by the Seventh Circuit. More important, by including a Tucker Act remedy, the new Rock Island Act expressly provides

for the recovery of just compensation for any taking that may occur as a result of the operation of the statute.[5] Accordingly, the controversy that is presented in this appeal and that forms the basis for the June 9, 1980, injunction has been mooted by the intervening legislation. "Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly." *United States* v. *Alaska Steamship Co.*, 253 U.S. 113, 116 (1920); cf. *Zablocki* v. *Redhail*, 434 U.S. 374, 382 n.9 (1978) (case not moot because new statute did not remove possibility that statute at issue would still apply).

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[5] Congress clearly indicated that this amendment was intended to cure the problems that had led to the issuance of the June 9, 1980, injunction. The Conference Report stated:

> The House amendment clarifies the Rock Island Transition and Milwaukee Railroad Restructuring Act to state affirmatively that nothing in these Acts shall limit the right of any person to bring an action under the Tucker Act. This provision was not in the original Acts on the grounds that there continued to exist a Tucker Act remedy where Congress has not explicitly waived such a remedy. See Regional Rail Reorganization Cases, 419 U.S. 102, 125 (1974). However, in reviewing Judge Garr's [*sic*] injunction of the Rock Island Transition Act, Justice Stevens expressed concern about the availability of such a remedy where [*sic*] the injunction to be lifted and were the Act subsequently to be held unconstitutional, —— U.S. —— (1980). This specific provision clearly establishes that the Tucker Act is available and nothing in these Acts limits the right of any person to seek redress under the Tucker Act.

H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 137 (1980), *reprinted in* 126 Cong. Rec. H9931 (daily ed. Sept. 29, 1980).

In light of the mooting of this appeal by the passage of the Staggers Rail Act, this Court should note probable jurisdiction, vacate the judgment below and remand with directions to dismiss. *United States* v. *Munsingwear, supra,* 340 U.S. at 39-40 & n.2; *United States* v. *Alaska Steamship Co., supra,* 253 U.S. at 116; see also *Great Western Sugar Co.* v. *Nelson,* 442 U.S. 92, 94 (1979); *New Orleans Flour Inspectors* v. *Glover,* 161 U.S. 101, 103 (1896). There exists, of course, a separate question (not presented here) of the constitutionality of the new Rock Island Act, as amended by the Staggers Rail Act. This question was addressed by the district court in its October 15, 1980, order, and that order is now being reviewed by the Seventh Circuit, according to the mandate of Section 124(a) of the amended Rock Island Act, with a decision due by December 28, 1980.[6] When the court of appeals' decision is rendered, it will be subject to review by this Court. The district court's failure to vacate its June 9 order, however, has formed the basis for the Trustee's contention, incorrect in our view, that the Seventh Circuit lacks jurisdiction to hear the appeal now pending there. Vacating the June 9 injunction will eliminate the uncertainty concerning the proper avenue of appeal and will permit

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[6] The district court's belated effort to characterize the October 15, 1980, order as merely a "continuance" of the earlier injunction (App. D, *infra,* 14a) does not alter the fact that a new order was entered. As the court recognized in the text of the injunction (App. C, *infra,* 12a-13a), the Staggers Rail Act imposed new obligations on the parties that required a new injunction. Obviously, the June 9 order could not have enjoined the parties from performing obligations under a statute not yet in existence. This new order is clearly a decision "with respect to the constitutionality of" the new Rock Island Act, and therefore any appeal of the order must be taken to the Seventh Circuit under Section 124(a).

the merits of the constitutionality of the Rock Island Act, as amended by the Staggers Rail Act, to be resolved expeditiously in the manner prescribed by Congress.

CONCLUSION

This Court should note probable jurisdiction, vacate the judgment below and remand with directions to dismiss as moot.

Respectfully submitted.

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General Counsel

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Interstate Commerce Commission

NOVEMBER 1980

APPENDIX A

The Staggers Rail Act of 1980, Pub. L. No. 96-448 (Oct. 14, 1980), provides in pertinent part:

TITLE VII—MISCELLANEOUS PROVISIONS

ROCK ISLAND AND MILWAUKEE RAILROADS AMENDMENTS

SEC. 701. (a)(1) The Rock Island Railroad Transition and Employee Assistance Act (45 U.S.C. 1001 et seq.) is amended by redesignating section 124 as section 125 and by inserting immediately after section 123 the following new section:

"JUDICIAL REVIEW

"SEC. 124. (a) Notwithstanding any other provision of law, any appeal from—

"(1) any decision of the bankruptcy court with respect to the constitutionality of any provision of this Act; and

"(2) any decision of the court having jurisdiction over the reorganization of the Milwaukee Railroad with respect to the constitutionality of the Milwaukee Railroad Restructuring Act (45 U.S.C. 901 et seq.), shall be taken to the United States Court of Appeals for the Seventh Circuit.

"(b) If appeals are taken from decisions described in subsection (a) of this section involving section 106 or 110 of this title or section 9 or 15 of the Milwaukee Railroad Restructuring Act, the court of appeals shall determine such appeals in a consolidated proceeding, sitting en banc, and shall render a final decision no later than 60 days after the date the last such appeal is filed.

"(c) Nothing in this Act or in the Milwaukee Railroad Restructuring Act (45 U.S.C. 901 et seq.) shall limit the right of any person to commence an action in the United States Court of Claims under section 1491 of title 28, United States Code (commonly referred to as the Tucker Act)".

(2) Section 110(e) of the Rock Island Railroad Transition and Employee Assistance Act (45 U.S.C. 1008(e)) is amended by inserting "to employees" immediately after "liability".

(3) Section 15(e) of the Milwaukee Railroad Restructuring Act (45 U.S.C. 914(E)) is amended by inserting "to employees" immediately after "liability".

(b)(1) Section 106 of the Rock Island Railroad Transition and Employee Assistance Act (45 U.S.C. 1005) is amended to read as follows:

"EMPLOYEE PROTECTION AGREEMENTS

"SEC. 106. (a) No later than 5 days after the date of enactment of the Staggers Rail Act of 1980, in order to avoid disruption of rail service and undue displacement of employees, the Rock Island Railroad and labor organizations representing the employees of such railroad with the assistance of the National Mediation Board, may enter into an agreement providing protection for employees of such railroad who are adversely affected as a result of a reduction in service by such railroad. Such employee protection may include, but need not be limited to, employee relocation incentive compensation, moving expenses, and separation allowances.

"(b) If the Rock Island Railroad and the labor organizations representing the employees of such rail-

road are unable to enter into an employee protection agreement under subsection (a) of this section within 5 days after the date of enactment of the Staggers Rail Act of 1980, the matter shall be immediately submitted to the Commission. The Commission shall impose upon the parties by appropriate order a fair and equitable arrangement with respect to employee protection no later than 15 days after the date of enactment of the Staggers Rail Act of 1980, unless the Rock Island Railroad, and the authorized representatives of its employees have by then entered into a labor protection agreement. For purposes of this subsection, the term 'fair and equitable' means no less protective of the interests of employees than protection established by and pursuant to section 9 of the Milwaukee Railroad Restructuring Act (45 U.S.C. 908), subject to the limitations set forth in section 110 of this title.

"(c) If an employee protection arrangement is imposed by the Commission under subsection (b) of this section, the bankruptcy court shall immediately authorize and direct the Rock Island Railroad trustee to, and the Rock Island Railroad trustee and the labor organizations representing the employees of the railroad shall, immediately implement such arrangement.

"(d) Any order of the Commission under subsection (b) of this section and any order of the bankruptcy court under subsection (c) of this section may be appealed only to the United States Court of Appeals for the Seventh Circuit. Any such appeal to such court of appeals shall be filed within 5 days after the date of entry of the order of the Commission or the bankruptcy court, as the case may be, and such court of appeals shall finally determine such

appeal within 60 days after the date such appeal is filed.

"(e)(1) Any claim of an employee for benefits and allowances under an employee protection agreement or arrangement entered into under this section shall be filed with the Board in such time and manner as the Board by regulation shall prescribe. The Board shall determine the amount for which such employee is eligible under such agreement or arrangement and shall certify such amount to the Rock Island Railroad for payment.

"(2) Benefits and allowances under such agreement or arrangement entered into this section shall be paid by the Rock Island Railroad from its own assets or in accordance with section 110 of this title, and claims of employees for such benefits and allowances shall be treated as administrative expenses of the estate of the Rock Island Railroad.

"(f) The first sentence of section 7(b)(7) of the Railroad Retirement Act of 1974 (45 U.S.C. 231f (b)(7)) is amended by striking out "Milwaukee Railroad Restructuring Act" and inserting in lieu thereof ", the Milwaukee Railroad Restructuring Act, and the Rock Island Railroad Transition and Employee Assistance Act.".

APPENDIX B

EXCERPTS FROM THE TRANSCRIPT OF PROCEEDINGS—OCTOBER 7, 1980

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 75 B 2697

In the Matter of:

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, DEBTOR

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause, before the HONORABLE FRANK J. MCGARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Tuesday, October 7, 1980, at the hour of 2:00 o'clock p.m.

* * * *

THE COURT: I think I should make some comments on this.

As has been pointed out, it is in effect, a discussion of problems created by a law that is not yet a law but which will very probably become one soon. For that reason, I think the discussion is appropriate.

What I have before me, to be more precise about it, is motions by three parties to vacate a preliminary injunction, which I entered on June 9th, 1980. I have listened to the arguments on this. I have formed some tentative opinions. I don't really intend to rule on those motions because everybody is entitled to a little more chance to develop the matter with them-

selves and with me, and, of course, we should wait until it becomes a reality. I think these observations of mine are pertinent only because of the suggestion of Mr. Rush that I might find his position so appealing that I would agree now that the Commerce Commission is correct in regarding my former injunctive order as not binding upon them because this is in effect new and different legislation. I want to make my position clear so that there is no misunderstanding between myself and Mr. Rush and/or the Commission.

Actually, as has been adverted to, the basic vice of the Act which I held unconstitutional was the imposition of the cost of the Rock Island Rehabilitation Act on the Estate and thus on the creditors. I issued a preliminary injunction basically because I found the Act unconstitutional and thought it was my duty to enjoin the carrying out of the programs set forth by Congress seeking the unconstitutional goals that I found.

We had discussions of whether a preliminary injunction was issuable, and we discussed the traditional irreparable injury concept that goes with that determination. I did issue the preliminary injunction accompanied by a finding, among other things, that there was irreparable injury. The bill, as I now see it, amends and attempts to cure some of the procedural problems with the Act which was before me in an effort to remove the irreparable injury argument concerning the old Act. The new bill does not address the basic finding of the Court that the whole program which has been changed only cosmetically, to borrow somebody else's word, was an unconstitutional deprivation. I held that and an appeal is in progress. The argument that the Tucker Act is available and there-

fore we could go ahead with the unconstitutional taking because the Tucker Act will allow everything to turn out in the end really does not impress me. I share Mr. Moritz' comment, or argument, that you do not proceed, nor must the Court allow proceedings under what is patently unconstitutional legislation because there is a remedy somewhere down the line that may straighten things out. It really is not at all clear to me that to disperse the money now, to allow the claim against the assets of the Rock Island to accrue, to say to the Trustee that if this is all unconstitutional you can sue under the Tucker Act and get it back, is even to cure the irreparable harm argument. Mr. Murray argued that the very fact of the existence of the $75 million lien on the assets of the Rock Island is irreparable injury as it overshadows the efforts of the Trustee to continue the liquidation process relying, as he must, on the ability and willingness of people to extend credit under cost of administration terms.

So, as I said, my initial impression without ruling on it is that the new bill does not cure the old problem.

Mr. Rush asks me to agree that it is new legislation so that the old injunction, which he has moved to vacate is no longer binding on the Commission, and I would like to make it clear that I do not agree. This is not new legislation in my view. This is amended legislation which attempts, but fails, to clear the underlying flaws which caused me to find the bill unconstitutional in the first place. It remains basically the same law with the same defects and is subject to the same injunction. So, while I am not ruling on the motion to vacate the injunction because I would like the parties to have an opportunity to

develop the matters as fully as they wish before me, I am making these comments to make it clear that I do not agree with the Commerce Commission's suggestions that the injunction is no longer binding on them.

I think what we had better do, gentlemen, is to allow the various people opposing the motion to file some very quick responses, and then give Justice, the Commerce Commission and Mr. Clarke an opportunity to reply so that they will have a chance to air their views on it.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 B 2697

In the Matter of

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR,

WILLIAM M. GIBBONS, as Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; and HENRY CROWN, ET AL., PLAINTIFFS,

v.

THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, DEFENDANTS.

PRELIMINARY INJUNCTION

This matter is before the court on the motion of intervenor Railway Labor Executives Association ("RLEA"), requesting this court [to] vacate the preliminary injunction issued on June 9, 1980, enjoining enforcement of sections 106 and 110 of the Rock Island Transition and Employee Assistance Act ("Rock Island Act" or the "Act"), 45 U.S.C. §§ 1005, 1008, on the grounds that all constitutional defects have been remedied by passage of the Railroad Trans-

portation Policy Act of 1980 ("Staggers Rail Act of 1980"), H.R. Rep. 1430, 126 Cong. Rec.-House 9892 (Sept. 29, 1980). The trustee and certain creditors also seek a declaratory judgment and injunctive relief declaring the Rock Island Act as amended by the Staggers Rail Act, unconstitutional and enjoining its enforcement. In anticipation that the Staggers Rail Act would be signed into law, the court heard arguments on October 7, 1980, from all interested parties, addressed to the effect of the Staggers Rail Act on the court's preliminary injunction.

This court issued a preliminary injunction on June 9, 1980, when, based upon findings of fact and conclusions of law delivered from the bench, the court concluded that "the probability of determination of unconstitutionality of this Act after more mature consideration and deliberation is exceedingly great. . . ." Transcript of Proceedings, June 9, 1980 at 81. Specifically, the injunction prevented the Interstate Commerce Commission and the Secretary of Transportation from imposing a $75,000,000 loan with cost of administration status on the bankrupt estate. These proceeds were to fund a labor protection arrangement created under the Act. This determination was based upon the court's finding that the provisions of the Act mandated a taking of private property of the estate without compensation, in violation of the fifth amendment.

On June 28, 1980, United States Justice John Paul Stevens denied RLEA's motion for a stay of this court's injunction.

The Staggers Rail Act became law on October 14, 1980. It amends certain provisions of the Rock Island Act and re-enacts the labor protection obligations previously found unconstitutional by this court.

The re-enacted labor protection requirements appear to be essentially the same as under the original Act except that the time available for the trustee and the Commission to respond is shortened and the anti-stay provisions of section 106 have been eliminated.

This court has studied the Staggers Rail Act amendments to the Rock Island Act, has reviewed carefully the arguments of counsel, the documents filed by the various parties, the ruling of June 9, 1980, and the court's knowledge of these proceedings, and it remains clear that the Rock Island estate continues to be exposed to irreparable injury by the provisions of the Rock Island Act as amended by the Staggers Rail Act. The Staggers Rail Act does not cure the defects found in the Rock Island Act. Like its predecessor, the Staggers Rail Act imposes a $75,000,000 cost of administration claim on the Rock Island estate with priority over claims of general creditors and shareholders on the assets of the estate.

Petitioner argues that the statutory scheme can be implemented, the money disbursed, and the validity of the program and extent of the Rock Island liability to finance it, later litigated. This, in fact, cannot be done without irreparable injury to the administration of the estate for the benefit of the creditors. The trustee is currently liquidating assets and preparing the plan for distribution to creditors. Under court order, the trustee is also preparing an interim plan for the immediate partial satisfaction of cost of administration claims. The imposition of a $75,000,000 uncertainty on the estate will totally halt the liquidation for the long period consumed by the appellate process, with irreparable injury to the already long-suffering creditors. Further, the whole liquidation plan will be distorted by the brooding omnispres-

ence of a potential liability representing a significant percentage of the total assets.

Pursuant to the requests for relief in the written filings and arguments of counsel, the court orders the issuance of a preliminary injunction.

1) The Rock Island Act as amended and re-enacted by the Staggers Rail Act effects an unconstitutional taking of private property in violation of the rights of the Rock Island estate, its creditors and shareholders which are secured by the Fifth Amendment of the United States Constitution.

2) The implementation of this Act will constitute irreparable harm to the estate.

3) The court's injunction of June 9, 1980 remains in full force and applies to sections 106 and 110 of the Rock Island Act, as amended and re-enacted by the Staggers Rail Act.

4) The court orders the issuance of a preliminary injunction:

a) preliminarily enjoining the Interstate Commerce Commission from asserting jurisdiction to consider or to impose any labor protection arrangement or obligation under the Rock Island Act as amended and re-enacted by the Staggers Rail Act; and

b) preliminarily enjoining the trustee, William M. Gibbons, from entering into negotiations respecting any labor protection agreement and from implementing any labor protection agreement under the Rock Island Act as amended and re-enacted by the Staggers Rail Act; and

c) preliminarily enjoining the United States Secretary of Transportation from requesting, approving or guaranteeing any loan or obligation on the estate of the Chicago, Rock Island and

Pacific Railroad Company under the provisions of the Rock Island Act as amended and re-enacted by the Staggers Rail Act.

ENTER:

FRANK J. MCGARR
United States District Judge

DATED: October 15, 1980

APPENDIX D

ORDER OF THE UNITED STATES DISTRICT COURT

OCTOBER 16, 1980

The Preliminary Injunction entered October 15, 1980 is hereby corrected as follows:

1) p. 1 [9a], lines 1 and 2 should read: "This matter is before the court on the motion of intervenor Railway Labor Executives Association ('RLEA'), joined by the United States and the Interstate Commerce Commission, requesting this court. . . ."

2) p. 3 [11a], line 13 [18] should read: ". . . Island estate with priority over claims of creditors and. . . ."

3) p. 4 [12a], line 4 should read: ". . . arguments of counsel, the court orders the continuance of the preliminary. . . ."

4) p. 4 [12a], line 16 [18] should read: "4) The court orders the continuance of the preliminary injunction: . . ."

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Nos. 80-415 and 80-1239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant,

v.

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island & Pacific Railroad Company; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; HENRY CROWN, *ET AL.*; UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; AND ANDREW L. LEWIS, JR., Secretary of Transportation,
Appellees.

Consolidated Appeals From The United States District Court For The Northern District Of Illinois And From The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR APPELLANT

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Date: July 22, 1981

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED*

1. Whether the issue of the constitutionality of Sections 106 and 110 of the Rock Island Transition and Employee Assistance Act (RITA), as modified by Section 701 of the Staggers Rail Act of 1980, is properly before this Court?

2. Did the Rock Island Reorganization Court improperly enjoin an Act of Congress intended to provide immediate protective benefits to needy Rock Island employees where there was no valid showing that the estate would be irreparably harmed while the Trustee complied with the directives of a statute which Congress has twice declared to be essential to the public interest?

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*This consolidated proceeding involves two appeals, one (No. 80-415), from a preliminary injunction entered on June 9, 1980, by the United States District Court for the Northern District of Illinois, sitting as a railroad reorganization court for the Chicago, Rock Island & Pacific Railroad; the other (No. 80-1239), from a decision entered by the United States Court of Appeals for the Seventh Circuit on December 16, 1980, affirming by an equally divided *en banc* court an injunctive order issued by the Rock Island reorganization court in October 1980. Both appeals have been taken by the Railway Labor Executives' Association, a voluntary, unincorporated association of the Chief Executive Officers of virtually all of the standard labor organizations which represent railroad employees in this country. The member organizations of appellant are listed in Appendix B to this Brief. The Trustee of the Rock Island estate, the First National Bank of Chicago and the Continental Illinois National Bank and Trust Company of Chicago, as Indentured Trustees, and Henry Crown, *et al.*, as shareholders and general creditors, initiated the proceeding before the reorganization court out of which these appeals have arisen by requesting declaratory and injunctive relief. That proceeding was one against the United States of America, the Interstate Commerce Commission, and the Honorable Neil P. Goldschmidt as Secretary of Transportation. Appellant, an intervenor in the reorganization proceeding, participated therein as an active party. The Honorable Andrew L. Lewis, Jr., pursuant to Rule 40.3 of the Rules of this Court, has been substituted for his predecessor as a named appellee.

3. Did Congress, by specifically providing that nothing in RITA "shall limit the right of any person to commence an action" under the Tucker Act, effectively preclude the conclusion by the courts below that Section 106 of RITA effects an uncompensated taking of private property for public purposes?

4. Does Congress, after concluding that the public interest requires adequate protection of railroad employees, have the power to require the protection of employees as a term upon which a railroad in reorganization under Section 77 of the Bankruptcy Act may withdraw its assets from the business of providing interstate rail transportation?

5. Was the Rock Island Reorganization Court correct in concluding that the public interest no longer remains an important part of its exercise of jurisdiction under Section 77 of the Bankruptcy Act?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Nos. 80-415 and 80-1239

RAILWAY LABOR EXECUTIVES' ASSOCIATION,

Appellant,

v.

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island & Pacific Railroad Company; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; HENRY CROWN, *ET AL.*; UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; AND ANDREW L. LEWIS, JR., Secretary of Transportation,

Appellees.

Consolidated Appeals From The United States District Court For The Northern District Of Illinois And From The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR APPELLANT

On May 30, 1980, the Rock Island Transition and Employee Assistance Act [hereinafter, "RITA"] was enacted into law as Title I of Pub. L. No. 96-254, 94 Stat. 399. In Section 106 of that Act, 45 U.S.C. § 1005, Congress provided a detailed scheme to assure that needy employees of the Chicago, Rock Island & Pacific Railroad Company [hereinafter, "CRI" or "Rock Island"] received immediate financial assistance. However, on June 9, 1980, the United States District Court for the Northern District of Illinois, sitting as a railroad reorganization court for the Rock Island under Section 77 of the

Bankruptcy Act, 11 U.S.C. § 205,[1] issued a preliminary injunction at the request of the Trustee, the major shareholders, and certain creditors, preliminarily enjoining implementation of that employee protective program. Appellant Railway Labor Executives' Association [hereinafter, "RLEA"] noted and then perfected an appeal to this Court from that interlocutory injunction (No. 80-415). On April 27, 1981, this Court directed that further consideration of the question of jurisdiction be postponed to the hearing of the case on the merits.

While appellant's jurisdictional request was pending before this Court, Congress passed the Staggers Rail Act of 1980 [hereinafter, "SRA"], Pub. L. No. 96-448, 94 Stat. 1895, which, in Section 701, amended Section 106 of RITA. The SRA was enacted on October 14, 1980. By an order dated October 15, 1980, as modified by a subsequent order dated October 16, 1980, the Rock Island reorganization court again enjoined, preliminarily, implementation of Section 106 of RITA and declared that the statutory provision was unconstitutional as effecting an uncompensated taking of private property for public purposes. Appellant RLEA immediately took an appeal from that interlocutory order to the United States Court of Appeals for the Seventh Circuit pursuant to Section 124(a) of RITA, 45 U.S.C. § 1018(a). On December 16, 1980 the court of appeals entered an order affirming by an equally divided *en banc* court the October 1980 preliminary injunction. Appellant RLEA noted and thereafter perfected an appeal to this Court (No. 80-1239), and on April 27, 1981, this Court noted probable jurisdiction and consolidated this case with appellant's appeal in No. 80-415.

OPINIONS BELOW

No opinions or orders issued in these cases by the courts below are reported. The preliminary injunction at issue in No.

[1] Section 77 of the Bankruptcy Act has been repealed by the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, but that repeal is not effective for cases which were pending under Section 77 when the Reform Act was enacted. Section 403(a), 92 Stat. 2683.

80-415 was issued by the Rock Island reorganization court on June 9, 1980 (J.A.[2] 159a-60a) and was supported by oral statements of that court given on June 9, 1980 (J.A. 151a-58a), and then on June 20, 1980 (J.A. 177a-84a) when that court denied motions to reconsider. On October 7, 1980, the reorganization court orally stated its tentative conclusions why it believed the SRA amendments did not cure, in its opinion, the constitutional defects which it saw in RITA (J.A. 201a-04a), and it thereafter issued an order dated October 16, 1980, preliminarily enjoining Sections 106 and 110 of RITA, as amended. J.A. 205a-08a. That order was modified by a minute order dated October 16, 1980. J.A. 209a. On December 16, 1980, the United States Court of Appeals for the Seventh Circuit, sitting *en banc*, affirmed by an equally divided court (J.A. 210a-11a) the October 1980 preliminary injunction without an opinion. The judgment accompanying the court of appeals unpublished *per curiam* order is reproduced in the Jurisdictional Statement in No. 80-1239, at 31a-32a.

JURISDICTION

Appellant RLEA's appeal in No. 80-1239 involves an appeal from an order of the United States Court of Appeals for the Seventh Circuit affirming an interlocutory order which held that portions of an Act of Congress were unconstitutional, and preliminarily enjoined agencies of the federal government, as well as the Rock Island Trustee, from complying with certain commands of that Act. Appellant RLEA respectfully submits that this Court has jurisdiction over this appeal by virtue of 28 U.S.C. § 1252. *Accord, Parker* v. *Levy*, 417 U.S. 733 (1974). The order and judgment of the court of appeals were entered on December 16, 1980, and appellant RLEA noted its appeal on December 19, 1980. J.A. 16a. Appellant RLEA docketed its appeal with this Court on January 21, 1981.

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[2] "J.A." as used herein refers to the Joint Appendix.

Appellant RLEA's appeal in No. 80-415 involves an appeal from an earlier order declaring portions of an Act of Congress unconstitutional and preliminarily enjoining agencies of the Federal Government, as well as the Rock Island Trustee, from complying with certain commands of that Act. That preliminary injunction was entered on June 9, 1980, and appellant RLEA noted its appeal to this Court on June 11, 1980. J.A. 10a. Appellant's appeal was timely docketed on September 15, 1980. However, as explained *infra* at p. 21 n.12, appellant RLEA respectfully submits that the events in No. 80-1239 have rendered its appeal in No. 80-415 moot. Consequently, appellant RLEA suggests that this Court note probable jurisdiction and then vacate the June 9th injunction as being moot.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

These appeals involve the validity of Sections 106 and 110 of RITA, 45 U.S.C. §§ 1005, 1008, as amended by the SRA. These provisions, both as originally enacted and as amended, are set forth in Appendix A to this Brief. Sections 106 and 110 of RITA have been asserted to be contrary to the commands of the Fifth Amendment to the Constitution of the United States, which is also reproduced in Appendix A. Section 124(c) of RITA, as added by the SRA, 45 U.S.C. § 1018(c), is involved as well, and it is reproduced in Appendix A.

STATEMENT OF THE CASE

Incorporated in Delaware in 1947, the Rock Island is the successor in interest to the Chicago, Rock Island and Pacific Railway, a carrier which was in reorganization under Section 77 of the Bankruptcy Act from 1933 to 1947.[3] *In re Chicago R.I. & P.Ry.*, 267 I.C.C. 867 (1947); *see also*, 257 I.C.C. 307

[3] The Rock Island was one of the first carriers to use Section 77 of the Bankruptcy Act, and it was in that proceeding, *i.e.*, the reorganization of the Chicago, Rock Island and Pacific Railway Company, that this Court upheld the constitutionality of that statute. *Continental Ill. Nat'l Bank* v. *Chicago, R.I. & P. Ry.*, 294 U.S. 648 (1935).

(1944). Originally chartered in 1847 the Rock Island's predecessor companies grew over the years by consolidations, acquisitions and construction of lines so that by the mid 1970's the CRI was one of the largest railroads in this country. By 1975, the Rock Island operated in thirteen (13) states, primarily in the midwestern region of the country, and its system consisted of 8,139 miles of main line track, 2,329 miles of branch lines, and 763.2 miles of trackage rights over other carriers. *Chicago, R.I. & P.R.—Abandonment,* 363 I.C.C. 150, 154 (1980). Approximately 10,000 workers were employed by the Rock Island in 1978 to perform those operations. The importance of the CRI system is exemplified by a 1974 statement of the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] in which the ICC described the Rock Island as providing a "service which is an important segment of the continental transportation system." *Chicago & N.W. Ry.—Control—Chicago, R.I. & P.R.,* 347 I.C.C. 556, 595 (1974). Unfortunately, the CRI's financial posture by the close of 1974 did not assure its continued survival.

A. The Demise Of The Rock Island

During the years after its capital restructuring in 1947, the Rock Island's operating revenues increased, but not as fast as the increase in its operating and maintenance expenses. To counter this increase in costs, the CRI deferred maintenance, but by 1965 the carrier began to sustain a net loss, and by 1967 it began to show a net loss from railway operations alone. *Chicago & N.W. RY—Control, supra,* 347 I.C.C. at 565, 691-96. That deficit operation posture did not improve by 1975 (*see, Chicago, R.I. & P.R.—Abandonment, supra,* 363 I.C.C. at 175), but rather, became more critical so that on March 17, 1975, the Rock Island once again sought the aid of Section 77 of the Bankruptcy Act to restructure its financial base. J.A. 1a. That petition for reorganization was approved on March 17, 1975, and on March 28, 1975, appellee William M. Gibbons was appointed Trustee of the debtor. J.A. 1a.

After the petition for reorganization was filed, the Rock Island continued to operate, first as a debtor-in-possession (J.A. 1a), and then under the direction of the Trustee. But even

though the carrier's cash position was temporarily improved by its ability under Section 77 to defer interest and principal payments, the Rock Island continued to experience operating losses as well as a steady erosion of its traffic base. Operating losses had increased from $6.5 million in 1968 to $22.2 million in 1974, and by the end of 1977 the operating loss for that year amounted to $38.5 million. *Chicago, R.I. & P.R.—Abandonment, supra,* 363 I.C.C. at 175. The Rock Island's rapidly deteriorating financial position was exacerbated by the severe winter of 1978, which not only dramatically increased its losses, but also damaged its physical plant. 363 I.C.C. at 177-81. Consequently, by the summer of 1979, the future of the Rock Island was not bright; moreover, its creditors and shareholders were demanding an end to deficit operations and the liquidation of that carrier.

During the control by Trustee Gibbons and the reorganization court, the Rock Island continued to bargain with its employees pursuant to the Railway Labor Act, 45 U.S.C. § 151, *et seq.* In 1977, however, the Trustee informed those organizations with which the CRI had bargained as a participant with other railroads on a national level, that it would no longer negotiate its work rules and wages on that basis. J.A. 275a. After more than two (2) years of negotiations, a labor organization representing approximately 1,600 Rock Island employees (J.A. 275a) was unable to reach an agreement with the Trustee. On June 20, 1979, the National Mediation Board proffered arbitration in accordance with Section 7 of the Railway Labor Act, 45 U.S.C. § 157. J.A. 276a. That proffer was accepted by the labor organization, but was rejected by the Trustee. J.A. 276a. Subsequently, the labor organization continued to negotiate with the Trustee under the auspices of the National Mediation Board during the "cooling-off" period provided for by Section 5, First of the Act, 45 U.S.C. § 155, First. J.A. 276a. On August 28, 1979, at the expiration of the status quo period, that labor organization struck the Rock Island. One day later, a second labor organization which represented approximately 2,500 CRI employees, also struck the Rock Island. J.A. 275a, 277a. Following these actions, the Trustee "locked-out" the striking Rock Island employees and

abolished the positions of its other organized employees; the Trustee then attempted to operate a truncated system with non-union personnel.

On September 20, 1979, the President, acting pursuant to Section 10 of the Railway Labor Act, 45 U.S.C. § 160, created an Emergency Board to investigate the disputes, thereby, invoking the status quo provisions of Section 10 of the Railway Labor Act. *Executive Order No. 12,159,* 44 Fed. Req. 54687 (September 21, 1979). Because of its lack of start-up capital, the Rock Island could not resume full operations in compliance with the status quo provisions of the Railway Labor Act, and on September 26, 1979, the Commission directed the Kansas City Terminal Railway Company [hereinafter, "KCT"] to operate "virtually all" of the Rock Island lines under 49 U.S.C. § 11125. *Directed Service Order No. 1398,* 360 I.C.C. 289, 290-92 (1979). As the ICC explained in its Abandonment Report: "Rock Island's cashlessness of September 1979 was the result of an arduous and painful erosion of its traffic base and facilities." *Chicago, R.I. & P.R.—Abandonment, supra,* 363 I.C.C. at 160. On September 26, 1979, the reorganization court denied the Trustee's oral application for authority to continue operating the CRI system. J.A. 3a.

Directed Service operations began on October 5, 1979, and continued into March 1980 when the ICC funds were near exhaustion. *See, Directed Service Order No. 1398 (Sub-No. 1),* 360 I.C.C. 478 (1979). Those operations by the KCT ceased on March 23, 1980, due to a lack of appropriated funds, but nevertheless, the need for Rock Island service which warranted the invocation of Section 11125 continued to exist. *Directed Service Order No. 1462,* 363 I.C.C. 72, 74 (1980). To meet that need, the ICC directed various railroads under Section 11125 to operate portions of the CRI system on a voluntary basis without compensation. *Id.* As the Commission stated in explanation of its actions:

> Shippers along the involved lines still require significant rail service. A prolonged cessation of service after the expiration of Directed Service Order No. 1398 on March 23, 1980, would disrupt local traffic all along these lines.

> In view of the urgent need for continued service over RI's lines pending the implementation of long-range solutions, we consider it imperative to authorize some form of interim service.

363 I.C.C. at 74. That action was only a stop-gap measure, however, because the Commission's authority to direct operations over CRI lines was for a limited duration—*i.e.*, only 240 days from October 5, 1979. *Id.* at 75. Proceedings before the reorganization court in early 1980 made it clear that the Rock Island would most likely not be able to resume operations when directed service ended.

On January 25, 1980, the CRI reorganization court concluded that the railroad was not reorganizable. However, the reorganization court made that conclusion without the benefit of a report from the ICC under 11 U.S.C. § 205 (d), and thus, it refused to transmit to the ICC, as mandated by Bankruptcy Rule 8-303, the plan of reorganization which had been filed by the Trustee on December 28, 1979. Instead, that court ordered the Trustee to plan for the liquidation of the debtor.[4] Thereafter, the reorganization court began to authorize certain acts on the part of the Trustee designed to accomplish liquidation of the estate by either abandonment of lines or sales of Rock Island property to interested purchasers. On April 14, 1980, the reorganization court authorized the Trustee to file by April 24, 1980, an application with the ICC under Section 17(a) of the Milwaukee Railroad Restructuring Act

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[4] Appellant RLEA took an appeal from the liquidation order to the United States Court of Appeals for the Seventh Circuit (No. 80-1353) on the ground, *inter alia*, that a Section 77 reorganization court does not have jurisdiction under Section 77 to order and to control the liquidation of a railroad in reorganization. *See, Ecker* v. *Western Pac. R.*, 318 U.S. 448 (1943); *In re Lehigh Valley R.*, 558 F.2d 137 (3rd Cir. 1977). On February 11, 1981, the court of appeals affirmed the liquidation order (J.A. at 377a), and on May 12, 1981, RLEA filed with this court a petition for a writ of certiorari to review that decision. Sup. Ct. No. 80-1899. That petition is still pending.

[hereinafter, "MRRA"], 45 U.S.C. § 915(a),[5] for "its report confirming the abandonment of the Rock Island's total railroad system subject to sale of portions of such system to other entities for their operations thereof . . . ." Order No. 232 at 1-2. The ICC was given until May 24, 1980, in which to file its advisory report, and any party desiring to comment on that report was given until May 30, 1980 to do so in writing; a hearing was set for June 2, 1980. *Id.* at 2.

On June 2, 1980, three days *after* RITA was enacted, the CRI reorganization court acted upon the Trustee's motion to abandon the entire Rock Island system and ruled that the "discontinuance of all of its [CRI's] rail services and obligations as a common carrier is hereby confirmed and decreed . . . ." Order No. 248 at 2; J.A. 271a. Moreover, the reorganization court also provided in that order that no provisions should be imposed to protect employees since:

> [L]abor protective conditions or arrangements are not required of Rock Island's estate pursuant to Section 17 of the MRRA by reason of Rock Island's systemwide termination of operations and total line abandonment which do not warrant further consumption of Rock Island's assets for protection payments to employees whose jobs with Rock Island are no longer in existence by reason of such total abandonment and operational discontinuance. . ., and, that consistent with ICC precedent, with the Rock Island's constitutional right to abandon its lines and discontinue its service, and with the equities of the Rock Island situation, no labor protection arrangements may be imposed on the Rock Island estate . . . . *Id.* at 1-2; J.A. 270a-71a.[6]

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[5] Section 17(a) of the MRRA gave the reorganization court the authority to authorize abandonments of Rock Island Lines, and it also provided that: "In authorizing any abandonment pursuant to this section, the court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under [49 U.S.C. § 11347] . . . ."

[6] On June 9, 1980, RLEA noted an appeal from that order (7th Cir. No. 80-1788), and on August 4, 1980, the United States also noted an appeal. 7th Cir. No. 80-2075. RLEA's appeal was argued on June 10, 1981.

B. Response of Congress To Rock Island's Plight

Shortly after the CRI reorganization court ordered the Trustee to liquidate the Rock Island, Congress began to consider legislation designed to preserve essential Rock Island services, albeit through other carriers. *See,* H.R. 6837, 96th Cong., 2d Sess. It was soon realized, however, that in order to deal effectively with the problems created by the demise of the Rock Island, Congress would have to address the treatment of Rock Island employees. As the record in this case clearly shows, there was, and still is an urgent need to consider the interest of Rock Island employees.

In 1978, the Trustee employed 10,749 people to operate the CRI (J.A. 86a, *see also,* J.A. 165a); 6,389 of those employees had been employees of the CRI for ten (10) years or more, and 1,590 of those long time workers had been with the Rock Island for thirty (30) or more years. J.A. 86a. By August 1979, the number of Rock Island employees had dropped to 9,713, and by December 1979, that number had further declined to 8,407. J.A. 99a; 13a. By June 1980, only 2,641 Rock Island employees were shown as having been retained in the various operations over CRI lines. J.A. 89a-90a; 165a. By that time, 2,557 other Rock Island employees were receiving benefits under the Railroad Unemployment Insurance Act, 45 U.S.C. § 351, *et. seq.,* 43 other employees who were unemployed had exhausted their benefits under that Act, some employees had retired, and many others were unaccounted for. J.A. 102a, 165a. The number of unemployed Rock Island employees increased over the summer of 1980, and by September 1980, 3,704 Rock Island workers were drawing Railroad Unemployment Insurance Benefits—*i.e.,* a maximum of $25 per day for (10) days during each fourteen (14) day registration period. J.A. 97a, 99a; 13a.

Rail labor had attempted to address the problem of the treatment of Rock Island and other bankruptcy carrier employees in the midwest by entering into an agreement on March 4, 1980 with major railroads involved in the midwest rail restructuring. That agreement, commonly called the

March 4 Hiring Agreement, was entered into "in an attempt to provide as many of its members with jobs as possible." *St. Louis S.W. Ry.—Purchase,* 363 I.C.C. 320, 380(1980). As the ICC explained in examining the scope of that agreement: "Few carriers seemed willing to purchase portions of RI or Milwaukee in large part due to the expenses of labor protection. In order to give carriers an incentive to purchase RI and Milwaukee lines, and thus hire RI and Milwaukee employees, RLEA" agreed to the Hiring Agreement levels of protection for certain employees. *Id.* That agreement, however, was only half of the employee protections required in the Rock Island situation since it did not provide any protection for CRI employees not hired by an acquiring carrier. *See,* H. Rpt. No. 96-839, 96th Cong., 2d Sess. at 53-62(1980). Congress, in its consideration of the proposals which became RITA, addressed itself to the treatment of "those individuals who will not be employed by a temporary operator or a permanent carrier." *Id.* at 22.

Shortly before the expiration of permissible directed service for the Rock Island lines, Congress passed on May 22, 1980, the bill which became Public Law 96-254 on May 30, 1980. In several provisions of Title I to that law (*i.e.,* RITA), Congress provided: (1) a means to continue interim operations until a permanent solution was obtained (*e.g.,* Sections 104, 120, and 122, 45 U.S.C. § 1003, 1015 and 1017); (2) a source of federally financed funds to acquire Rock Island properties (Section 112, 45 U.S.C. § 825); and (3) that the ICC was to expedite all applications to acquire or to lease Rock Island lines. Section 111, 45 U.S.C. § 1009. In other provisions of RITA, Congress provided assurances of protections for the interests of CRI employees, including a compromise employee protective arrangement (Section 106, 45 U.S.C. § 1005), priority of hiring (Sections 105, 107, 45 U.S.C. § 1004, 1006), and retraining assistance to separated CRI employees. Section 119, 45 U.S.C. § 1014. In Section 110 of the Act, 45 U.S.C. § 1008, Congress provided that the Trustee could obtain a federal loan guarantee to acquire the funds needed to comply with Section 106.

Section 106 of RITA and its funding provision Section 110, are the provisions at issue in these consolidated cases.

Section 106 of RITA was patterned after Section 9 of the MRRA, 45 U.S.C. § 908, and, as the House report explained:

> [P]rovides that the representative of the Rock Island Trustee and representatives of the Rock Island employees, with the assistance of the National Mediation Board, shall negotiate an employee protection arrangement within ten days of enactment. Should those negotiations prove unsuccessful, the ICC will impose, not later than 30 days after enactment, a fair and equitable arrangement no less protective of the employees than under section 9 of the Milwaukee Railroad Restructuring Act. The employee protection payments shall be administrative expenses as they were under section 9(d) of the MRRA . . . . The ICC, in imposing protection, shall consider benefits including moving expenses, separation allowances, health insurance benefits and other benefits, subject to the $75 million limitation. Because litigation may result from this provision, the bill provides for an expedited litigation procedure.

H. Rpt. No. 96-839, *supra*, at 22.

Congress carefully drafted that legislation to provide for an expeditious implementation of the mandated arrangement to protect Rock Island employees, and in the Conference Report on that bill, the conferees noted in reference to Section 106:

> This section mandates early implementation of employee protection to avoid disruption of rail service and undue displacement of employees. The conferees intend that if no agreement is reached within the initial 10-day period and the ICC prescribes an agreement, the bankruptcy court will take whatever actions are appropriate and necessary for the immediate implementation of such agreement, *so that payments to Rock Island employees will be made forthwith, notwithstanding any ensuing litigation concerning such payments. The conferees believe that legislation is essential to provide for an orderly transition.*

H. Rpt. No. 96-1041, 96th Cong., 2d Sess. at 26(1980) (emphasis added).

Section 106 was intended to be a compromise of a potentially larger obligation under Section 17(a) of the MRRA to provide employee protective benefits as developed under 49 U.S.C. § 11347 (H. Rpt. No. 96-839, *supra*, at 21-22), and it was believed that: "In determining the constitutionality of the statute, . . . the court will find that the benefits conveyed by this statute to the estate of the bankrupt railroad are so great so as to make any claims of constitutional 'taking' untenable." *Id.* at 22. That belief was premised upon Congress' opinion that as "part of the [liquidation] . . . order, the Rock Island must obtain a certificate of abandonment from the bankruptcy judge with a fair arrangement for employees at least as protective" of their interests as that required by 49 U.S.C. § 11347. *Id.* at 21; *see also, Id.* at 23. However, as shown above, three (3) days after RITA was enacted, the CRI reorganization Court ruled that the estate would not have to provide any employee protection in abandoning its rail system.

Three (3) days after the court authorized that abandonment, the Trustee along with the principal creditors and shareholders of the debtor filed a twenty-six (26) page Complaint with the reorganization court on June 5, 1980, seeking both a judgment declaring the entire Act unconstitutional, and an injunction enjoining its enforcement. J.A. 21a. A hearing on the Trustee's and creditors' request for interlocutory relief was conducted on June 9, 1980, before United States District Judge Frank J. McGarr sitting as the CRI reorganization court. At the conclusion of that hearing the court ruled that Sections 106 and 110 of RITA dealing with an employee protection arrangement were unconstitutional as depriving the estate of property for a public purpose, and possibly for other reasons as well. J.A. 153-54a, 183a. The Court, without making a specific finding of irreparable harm except concluding that the Act was unconstitutional, issued a preliminary injunction: (1) enjoining the ICC from asserting jurisdiction to consider or to impose any employee protective arrangement, (2) enjoining the Trustee from entering into negotiations with labor representatives to arrive at an agreement under RITA,

and (3) enjoining Secretary of Transportation Neil P. Goldschmidt from complying with obligations imposed by Section 110(a) of the Act. J.A. 160a.

On June 11, 1980, RLEA filed a notice of Appeal to this Court from that order (J.A. 10a) and on September 15, 1980, it perfected that appeal (No. 80-415) by filing its Jurisdictional Statement. The United States also noted an appeal from the June 9th order (J.A. 10a); however, it did not perfect its appeal. Rather, in November 1980 the government filed a pleading as an appellee in RLEA's appeal asserting that the SRA amendments rendered RLEA's appeal from the June 9th order moot. The government suggested that this Court note probable jurisdiction and vacate the injunctive order.

On June 20, 1980, the United States filed a motion with the District Court requesting that court to reconsider its ruling of June 9, 1980, and to vacate the injunction (J.A. 10a). Appellant RLEA and the ICC supported that motion (*Id.*), but after hearing oral argument on June 20, 1980, the court denied those requests. In doing so, the court reiterated its earlier view that Sections 106 and 110 of RITA were unconsitutional for several reasons, but specifically enumerated only one such reason—*i.e.*, "any imposition of labor protection by Congress on the Rock Island payable out of the Estate was an unconstitutional taking." J.A. 184a.

Appellant RLEA filed with this Court on June 21, 1980, an application for a stay of that preliminary injunction, but on June 28, 1980, Mr. Justice Stevens denied that request with a written statement. After examining the pleadings filed with the application for a stay, Mr. Justice Stevens stated:

> . . . I am now of the opinion that Judge McGarr was probably correct in concluding that the Act authorizes an unconstitutional taking or property of the estate. It appears to direct a transfer of $75 million off the top of the estate's assets to the employees. While such a transfer might be permissible in the course of a genuine reorganization, at least as of this moment, I have difficulty perceiving how, in the context of a liquidation, this is any-

> thing other than a simple taking of the property of the general creditors, as the trustee argues.

RLEA v. *Gibbons*, 448 U.S. 1301, 1305 (1980) (Stevens, J., *in chambers*). Mr. Justice Stevens then went on to note that since it was not clear that the Tucker Act (28 U.S.C. § 1491), was available, there was a "strong possibility that a stay would set in motion a chain of events that would lead to substantial payments that are unconstitutional and unrecoverable . . . ." *Id.* Such a possibility was, according to Mr. Justice Stevens, "a sufficient showing of irreparable damage [so as] . . . to support the entry of the preliminary injunction." *Id.* On July 2, 1980, the full Court, with three Justices dissenting and one Justice abstaining, voted to deny that stay request. 448 U.S. 909 (1980).

C. Congress' Second Response To The Plight Of Rock Island Employees

When it became apparent that litigation over the validity of Sections 106 and 110 of RITA would delay the immediate distribution of funds to needy Rock Island employees, Congress again considered that legislaion. *E.g.*, H.R. 7235, § 227, 96th Cong., 2d Sess., 126 Cong. Rec. H8619 (September 9, 1980). On September 30, 1980, Congress passed the Staggers Rail Act of 1980, and by Section 701 of that Act amended RITA. Section 701(a)(1) addressed the concern of this Court that the Tucker Act remedy might not be available to persons who belived they were deprived of property by virtue of RITA; it added a new provision (Section 124, 45 U.S.C. § 1018) which provided in subsection (c) that: "Nothing in this Act . . . shall limit the right of any person to commence an action in the United States Court of Claims under section 1491 of title 28, United States Code (commonly referred to as the Tucker Act)." As Congress explained in its Conference Report to accompany the SRA, H.Rpt. No. 96-1430, 96th Cong. 2d Sess. at 138 (1980):

> By specifically stating that there is a Tucker Act remedy, the benefits and allowances will immediately become

available to the qualifying Rock Island employees and the Trustee may pursue his allegations of unconstitutional action under the Tucker Act.

To assure further that there would be no delay in the distribution of funds to employees, Congress added as Section 124(a)(1) of RITA a provision which provided that: "Notwithstanding any other provisions of law [*i.e.*, 28 U.S.C. § 1252], any appeal from . . . any decision of the bankruptcy court with respect to the constitutionality of any provision of this Act . . . shall be taken" to the Seventh Circuit; and it added as Section 124(b) of RITA the requirement that any such appeal "involving section 106 or 110 of this title" be decided within sixty (60) days by that court sitting *en banc*.

Section 701(b)(1) of the SRA modified the provisions of Section 106 of RITA and reenacted that section. These modifications to Section 106 may readily be seen by examining the side-by-side comparison of the two Acts in Appendix A, hereto; but basically the new provision established a shorter schedule for the negotiation or imposition of a protective arrangement (H.Rpt. No. 96-1430, *supra*, at 137), and it repealed the anti-stay and limited review features of the original provision. *Compare*, Section 106(d), as amended. Section 110 was also modified by the SRA, for Section 701(a)(2) added the words "to employees" immediately after "liability" in Section 110(e) of RITA, thus eliminating the contention that Section 110(e) removed the Tucker Act remedy.

Shortly after the SRA bill was sent to the President for his signature, appellant RLEA, the United States and the ICC asked the CRI reorganization court to vacate the June 9th injunction. J.A. 11a. Appellant RLEA also requested that the court direct the Trustee to negotiate with labor to devise a protective agreement under Section 106(a). Appellant and the Government parties asserted that enactment of the SRA would moot the June 9th injunction, and that by expressly providing that the Tucker Act was available to the appellees, Congress eliminated appellees' claim of irreparable harm. Oral argument was held on those motions on October 7, 1980, and

after listening to those arguments the reorganization court stated its tentative conclusions which were later finalized by the order dated October 15, 1980. As the court stated on October 7, 1980:

> The bill, as I now see it, amends and attempts to cure some of the procedural problems with the Act which was before me in an effort to remove the irreparable injury argument concerning the old Act. The new bill does not address the basic finding of the Court that the whole program which has been changed only cosmetically . . . was an unconstitutional deprivation.

J.A. 202a. And as the court then added: "This is amended legislation which attempts, but fails, to clear the underlying flaws which caused me to find the bill unconstitutional in the first place. It remains basically the same law with the same defects and is subject to the same injunction." J.A. 203a.

On October 16, 1980, the reorganization court issued an order dated October 15, 1980, and entitled "Preliminary Injunction".[7] J.A. 207a. In that order the court concluded that:

> The Rock Island Act as amended and re-enacted by the Staggers Rail Act effects an unconstitutional taking of private property in violation of the rights of the Rock Island estate, its creditors and shareholders which are secured by the Fifth Amendment of the United States Constitution.

J.A. 207a.

Appellant RLEA and the Government had also argued that the reorganization court should not preliminarily enjoin enforcement of Sections 106 and 110 of RITA because the SRA amendments to RITA effectively eliminated any claim of irreparable harm. *E.g.*, J.A. 192a-93a. The court disagreed and concluded that the statutory scheme could not be implemented without causing "irreparable injury to the administra-

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[7] By an order dated October 16, 1980, the reorganization court modified its October 15th dated order to read that the court was continuing the June 9th injunction in effect rather than issuing a new injunction. J.A. 209a.

tion of the estate for the benefit of the creditors." J.A. 207a. As the court explained:

> The trustee is currently liquidating assets and preparing the plan for distribution to creditors. Under court order, the trustee is also preparing an interim plan for the immediate partial satisfaction of cost of administration claims. The imposition of a $75,000,000 uncertainty on the estate will totally halt the liquidation for the long period consumed by the appellate process, with irreparable injury to the already long-suffering creditors. Further, the whole liquidation plan will be distorted by the brooding omnipresence of a potential liability representing a significant percentage of the total assets.

J.A. 207a. The Court then issued the same form of injunctive order as it had issued on June 9th, and on October 16, 1980, appellant RLEA filed a notice of appeal to the Seventh Circuit pursuant to Section 124(a)(1) of RITA, as added by the SRA. J.A. 12a. The Government also took an appeal to the Seventh Circuit from that order on October 29, 1980. J.A. 13a.

RLEA's and the Government's appeals were consolidated and were heard *en banc* on November 13, 1980. On December 16, 1980, the Court of Appeals issued an order affirming the order of the reorganization court by an equally divided court.[8] J.A. 210a. Because two Judges disqualified themselves, only six judges heard the appeal; three of the Judges who heard the appeals voted to reverse[9] and three of the Judges voted to affirm.[10] No opinions were filed with that short order. This appeal has followed.

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[8] Appellees Trustee, creditors and shareholders moved to dismiss RLEA's appeal due to lack of jurisdiction in light of 28 U.S.C. § 1252 and RLEA's appeal to this Court in No. 80-415. The court concluded that in view of the Staggers Rail Act the motion to dismiss the appeal should be denied. J.A. 211a. *See also, Gibbons* v. *RLEA*, Sup. Ct. No. 80-704.

[9] Chief Judge Fairchild and Judges Sprecher and Cudahy voted to reverse.

[10] Judges Swygert, Bauer and Wood voted to affirm.

SUMMARY OF ARGUMENTS

I. While 28 U.S.C. §1252 gives this Court jurisdiction over appellant RLEA's appeals from two interlocutory orders which enjoined, on constitutional grounds, the implementation of the employee protection program established by RITA, not all of the constitutional issues considered by the courts below were properly before those courts or are properly before this Court. Appellant's appeal in No. 80-415 from the preliminary injunction issued in June 1980 is now moot because a decision on the validity of that order will not affect the positions of the adversary parties. It is the subsequent amendments to the statutes at issue, and the subsequent injunctive order which will determine whether those sections are to be enforced. *E.g., United States* v. *Alaska S.S. Co.*, 253 U.S. 113 (1920). Appellants' appeal in No. 80-1239 from the second injunctive order places before this Court in a "clean-cut and concrete form" the constitutional issue of whether the availability of a Tucker Act remedy obviates a finding that Sections 106 and 110 of RITA, as amended, can effect an *uncompensated* taking since, at the time of the taking, adequate provision for compensation must be present. *Dames & Moore* v. *Regan*, Sup. Ct. No. 80-2078, decided July 2, 1981; *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974). The issue on which the courts below enjoined this Act of Congress, however, was not justiciable when the lower courts passed on that question, and is still non-justiciable since the question as posed by the Rock Island appellees, as to whether Section 106 and 110 of RITA are regulations which have become takings, involves an ad hoc, factual inquiry which is best resolved on a claim for compensation when the facts are fully developed *after* the empioyee protection program has been implemented. *Hodel* v. *Virginia Surface Mining & Reclamation Assoc., Inc.*, Sup. Ct. No. 79-1538, decided June 15, 1981; *Coffman* v. *Breeze Corporations, Inc.*, 323 U.S. 316 (1945).

II. A. Congress, the ultimate arbiter of the public interest, has twice declared that the immediate implementation of

RITA's employee protective program was essential to continued rail service for a substantial region of our country, but nevertheless, the courts below enjoined the implementation of that program because, in their view, the statute was unconstitutional in that it took private property for a public purpose. That conclusion, appellant RLEA submits, was erroneous because it failed to recognize that the Fifth Amendment to the Constitution prohibits only uncompensated takings; so long as Congress has provided a reasonable, certain and adequate means to obtain just compensation, an asserted taking is not unconstitutional. *Regional Rail Reorganization Act Cases, supra.* Here, Congress has provided through the Tucker Act, 28 U.S.C. §§1346(a), 1491, a reasonable, certain and adequate means to obtain compensation, and thus, Sections 106 and 110 can neither be declared invalid nor enjoined as effecting an unconstitutional taking of property. *Hurley* v. *Kincaid,* 285 U.S. 95 (1932).

B. Since the Tucker Act provides the compensation required, if the statute is eventually found to have effected a taking of private property, the injunction at bar should be set aside without any further inquiry into the taking question. However, if the issue of a taking is examined, it becomes apparent that Section 106 of RITA does not affect a taking of private property. Congress, as an exercise of its powers under the Commerce Clause (Act I, § 8, cl.3) has a clear right to allocate the economic burdens of life between a railroad and its employees. *United States* v. *Lowden,* 308 U.S. 225 (1939). Such an allocation, moreover, is not a taking in this case because by investing in a railroad, the creditors and investors have assumed the risk that Congress would insist that the object of their investment—the Rock Island estate—honor its obligations to assist its unemployed work force. *Accord, Reconstruction Finance Corp.* v. *Denver & R.G.W.R.,* 328 U.S. 495 (1946).

ARGUMENTS

I. The Issue Of The Validity Of The Preliminary Injunction Enjoining The Implementation Of An Act Of Congress On Constitutional Grounds Is Properly Before This Court Since That Preliminary Injunction Presents A Concrete Controversy Involving The Application Of The Fifth Amendment To Sections 106 and 110 Of RITA, As Modified By The SRA.

In its order of April 27, 1981, noting probable jurisdiction in No. 80-1239, this Court asked the parties to address the issue of whether the constitutionality of Sections 106 and 110 of RITA, as modified by the SRA, 45 U.S.C. §§ 1005, 1008, is properly before this Court. Appellant RLEA respectfully submits that the issue of whether Sections 106 and 110 of RITA, as modified, effect an *uncompensated* taking of private property for public purposes is properly before this Court since the CRI reorganization court, and then the court of appeals by affirming the interlocutory injunction, relied upon the Taking Clause of the Fifth Amendment to the United States Constitution[11] to enjoin the implementation of that Act of Congress. However, appellant respectfully submits that the underlying constitutional issue of whether those sections effect a *taking of property* within the meaning of the Fifth Amendment is not ripe for adjudication since that question is premature and is not presently presented in a "clean-cut and concrete form . . . ." *Rescue Army* v. *Municipal Court, 331 U.S. 549, 584 (1947).*[12]

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[11] The Taking Clause provides as follows: "[N]or shall private property be taken for public use without just compensation."

[12] Appellant RLEA respectfully submits that its appeal in No. 80-415 no longer presents a justiciable issue for that appeal has been rendered moot by the passage of the SRA amendments to Sections 106 and 110 of RITA. It is axiomatic that a reviewing court must examine the validity of an injunctive order in the light of the law as it stands when that injunction is reviewed, not as it stood when the injunction was issued. *Diffenderfer* v. *Central Baptist Church,* 404 U.S. 412, 414 (1972); *Bryan* v. *Austin,* 354 U.S. 933 (1957). Where the

When Congress enacted RITA in May 1980, it did so with the expressed intention that the employee protective features of that Act should be implemented immediately "so that payments to Rock Island employees will be made forthwith, notwithstanding any ensuing litigation concerning such payments." H. Rpt. No. 96-1041, 96th Cong., 2d Sess. at 26 (1980). That intent, however, was not honored, because, acting upon the Rock Island appellees' request for interlocutory injunctive relief, the CRI reorganization court concluded on June 9, 1980, that Sections 106 and 110, if implemented, would effect "an unconstitutional taking, an unconstitutional deprivation of the property rights of the creditors." J.A. 154a. After noting that the probability of a reaffirmation of the "unconstitutionality of this Act after more mature consideration and deliberations is exceedingly great" (J.A. 156a), the reorganization court decided that a balancing of the equities required the intrusion of the court into the "implementation of this statutory program on constitutional grounds." J.A. 154a.

Appellee United States had argued that it was premature to rule on the constitutionality of Section 106 since the ICC had

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amended law materially affects the rationale for the issuance of the injunction in the first place, it can nullify the justiciability of an appeal. *Hall* v. *Beals*, 396 U.S. 45, 48 (1969). Moreover, where the subsequent law is itself the new source of the dispute between the parties, a decision on the prior law will not affect the rights of the parties, and thus, an appeal from an injunction under the prior law is, without more, moot. *E.g.*, *United States* v. *Alaska S.S. Co.*, 253 U.S. 113, 115-17 (1920). That is the situation presented by appellant's appeal in No. 80-415, for the SRA amendments and the issues presented in No. 80-1239 will determine whether Section 106 can be implemented as Congress has directed; the injunction in No. 80-415 is now of academic interest only. Consequently, appellant respectfully submits, this Court should note probable jurisdiction over appellant's appeal in No. 80-415, and should vacate the June 9th interlocutory order of the reorganization court. *University of Tex.* v. *Camenisch*, Sup. Ct. No. 80-317, decided April 29, 1981.

not yet established the limit of the Trustee's potential obligation under that section. J.A. 144a-45a. That argument was rejected by the reorganization court which stated:

> It [the plan eventually promulgated by the ICC] might even be much less than the $75 million, it might be $50 million or $25 million. The issues [*sic*] is not whether the I.C.C. can arrive at a labor protection plan which the creditors and the Trustee could live with, even if that plan were to cost the Estate only $1 million. The issue is whether ab initio, the concept of a compelled labor protection plan, paid for out of the Estate, whatever the plan, has any constitutional sanction. We don't have to wait for an I.C.C. determination of the details of the plan to determine that issue.

J.A. 155a. The court then addressed that issue, and stated that:

> One of the central issues in this case is and always has been and will be and will continue to be to what extent the private sector, here the creditors and the bondholders, can be saddled with the public interest. Congress may determine public interest, but Congress may not take private property to serve the public interest.

J.A. 156a. Those conclusions were reiterated by the CRI reorganization court on June 20, 1981, when it denied appellant's and the federal appellees' motions to reconsider its earlier ruling. J.A. 180a.

After appellant and the government were unsuccessful in obtaining a stay of the June 1980 preliminary injunction (*RLEA* v. *Gibbons*, 448 U.S. 909 (1980)), Congress once again passed legislation on this subject, and it once again specifically expressed its intention that "the benefits and allowances [under Section 106 of RITA, as modified, should] . . . immediately become available to the qualifying Rock Island employees and the Trustee [could] . . . pursue his allegations of unconstitutional action under the Tucker Act [28 U.S.C. §§ 1346(a), 1491]." H. Rpt. No. 96-1430, 96th Cong., 2d Sess. at 138 (1980). But once again Congress' intent was blocked by the CRI reorganization court, and then by the

court of appeals, because, as the reorganization court held in its October order:

> The Rock Island Act as amended and re-enacted by the Staggers Rail Act effects an unconstitutional taking of private property in violation of the rights of the Rock Island estate, its creditors and shareholders which are secured by the Fifth Amendment of the United States Constitution.

J.A. 207a. The impact of the availability of a Tucker Act remedy on that conclusion, however, was not addressed by the lower courts even though appellant had argued that Congress' specific reference to the Tucker Act satisfied the compensation portion of the Fifth Amendment's Taking Clause. 7th Cir. No. 80-2487, Brief for Appellant at 32-35.

Since the October 1980 injunctive order and its affirmance by the court of appeals involve an "interlocutory . . . order . . . holding an Act of Congress unconstitutional in [a] . . . civil . . . proceeding to which the United States or any of its agencies, or any officer . . . is a party" (28 U.S.C. § 1252), this Court clearly has the jurisdiction to consider appellant's appeal in No. 80-1239. *Accord, Parker* v. *Levy,* 417 U.S. 733 (1974). Indeed, no party to this proceeding has disputed this Court's jurisdiction over this appeal. But while that jurisdiction may technically be present, its exercise over constitutional issues may be inappropriate if problems such as "prematurity and abstractness" present insuperable obstacles to its effective exercise. *E.g., Socialist Labor Party* v. *Gilligan,* 406 U.S. 583, 588 (1972). Appellant RLEA respectfully submits that no such problems make the exercise of that jurisdiction inappropriate over the constitutional issue of compensation which is presented by No. 80-1239. *E.g., Dames & Moore* v. *Regan,* Sup. Ct. No. 80-2078, decided July 2, 1981, slip op. at 31; *Regional Rail Reorganization Act Cases* [hereinafter, *"Rail Act Cases"*], 419 U.S. 102, 145-46. (1974). However the same is not true for the underlying issue of the taking itself.

Appellant RLEA respectfully submits that this appeal places before this Court in a clean-cut and concrete form the con-

stitutional issue of whether Congress' addition of Section 124 (c) to RITA, and its modification of Section 110(e) of that Act, obviates the conclusion that Sections 106 and 110 of RITA, as thus modified by Section 701 of the SRA, could effect an *uncompensated* taking of property. Implementation of Sections 106 and 110 of RITA were enjoined, over appellant's objections, because the courts below believed that those provisions constituted a taking of private property for public use. However, if at the time of the taking there is a "reasonable, certain and adequate provision for obtaining compensation" (*Cherokee Nation* v. *Southern Kansas Ry.*, 135 U.S. 641, 659 (1890)), the taking is not in violation of the Taking Clause of the Fifth Amendment. *Rail Act Cases, supra,* 419 U.S. at 124-27. Since all of the facts material to determining whether the Tucker Act remedy satisfies the just compensation portion of the Taking Clause, are developed as fully as can be at this stage of the implementation of Sections 106 and 110 of RITA, as modified, and since the implementation of those provisions is being enjoined because of the Taking Clause, it cannot be contended that this case presents the compensation issue in a non-justiciable, abstract manner. *E.g., Dames & Moore* v. *Regan, supra,* slip op. at 30-31; *accord, Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 94 n.39 (1978). An expedited trial on the merits of the Rock Island appellees' complaint (*see,* Rule 65(a)(2), Fed. R. Civ. P.), would not have shed any additional light on this question since a more developed factual record must await the actual implementation of the program—an event which will not occur until the bar of this injunction is removed. *Accord, Agins* v. *City of Tiburon,* 447 U.S. 255, 260 (1980). Moreover, it is clear that appellant's appeal is not premature, since a program which Congress has twice mandated should be implemented speedily has now been delayed for more than a year because of the controversy over the issue of compensation.

However, the conclusion that the compensation issue is properly before this Court in No. 80-1239, does not necessarily mean that the subsidiary issue whether Sections 106 and 110 of RITA constitute a taking of property, is also properly before this Court at this time. *Rail Act Cases, supra,* 419 U.S.

at 145-46. Appellant RLEA respectfully submits that the taking issue is not properly before this Court, and *a fortiori* was improperly passed upon by the courts below, for several reasons. First, if as appellant asserts the Tucker Act provides the compensation required by the Fifth Amendment, it is premature to consider whether a taking has occurred until a request for compensation is presented. No such request has been made here. Second, the underlying question of a taking as posed by the Rock Island appellees is still an abstract issue.

The Rock Island appellees assert that Section 106 of RITA is a regulation which has gone too far; but when a regulation becomes a taking is a question for which "this Court, quite simply, has been unable to develop any 'set formula' for determining . . . ." *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978). That determination ultimately involves "essentially ad hoc, factual inquiries" which include an examination of, among other factors, the degree of the intrusion of the regulation into the claimant's property interest. *Id.*; *see also, San Diego Gas & Electric Co.* v. *City of San Diego*, Sup. Ct. No. 79-678, decided March 24, 1981 (Brennan, J., dissenting), slip op. at 12-17. Such a detailed inquiry, appellant RLEA respectfully submits, involves more than a facial constitutional inquiry, and could not have validly been made in the case at bar until *after* the employee protection program has been implemented and the question of ultimate liability for that program becomes justiciable.

Section 106 of RITA, as amended, provides that if the parties are unable to reach an agreement on a protective formula, the ICC

> shall impose upon the parties by appropriate order a fair and equitable arrangement with respect to employee protection . . . . For purposes of this subsection, the term "fair and equitable" means no less protective of the interests of employees than protection afforded under [Section 9 of the MRRA, 45 U.S.C. § 908] . . . , subject to the limitations set forth in section 110 of this title.

45 U.S.C. §§ 1005(b). Section 110(d) of RITA provided that the total liability of the Rock Island for benefits and al-

lowances under Section 106 could "not exceed $75,000,000." 45 U.S.C. § 1008(d). Moreover, Section 106(e)(2) of the Act, 45 U.S.C. § 1005(e)(2) (emphasis added), provided that the Rock Island should pay such benefits or allowances either from its own assets "*or* in accordance with" Section 110 of the Act. Section 110(a), 45 U.S.C. § 1008(a) (emphasis added), provided that the Secretary of Transportation, upon request, "*shall* guarantee obligations of the Rock Island Railroad for purposes of providing employee protection in accordance with" Section 106. *See*, 12 U.S.C. § 2285. In short, Congress has provided in Sections 106 and 110 of RITA, a compact program designed to provide needed funds to employees, and yet, at the same time, not deplete the cash reserves of the estate.

While appellant RLEA respectfully submits that the facts of this case are sufficient to show at this time that Sections 106 and 110 of RITA survive a mere facial challenge to their constitutionality since they do not affront on their face the Due Process Clause of the Fifth Amendment (*e.g., United States* v. *Lowden*, 308 U.S. 225, 240 (1939)), a contrary determination (*i.e.*, that a regulation has become a taking) must await: (a) the promulgation of the arrangement; (b) its implementation; (c) its funding, and (d) a request for just compensation or a refusal to reimburse the government.[13] It will only be after

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[13] It should also be noted that the Indenture Trustees and the shareholders do not have standing to make a facial challenge on a Taking Clause basis for the following reasons. First, the secured bondholders have not shown that their security interest is insufficient to satisfy the estate's debt towards them. Consequently, their attack on statute is, at best, premature. *See, Warth* v. *Seldin*, 422 U.S. 490, 498-99 (1975). Second, the shareholders and the general creditors do not have a property interest directly affected by the enactment of the Section 106 obligation; their interest is only secondary in that the satisfaction of that obligation makes an ultimate satisfaction of their intangible interests more remote. Such indirect interests are not property rights protected by the Taking Clause. *Louisville & N.R.* v. *Mottley*, 219 U.S. 467, 484 (1911); *accord, Duke Power Co.* v. *Carolina Env. Study Group, supra*, 438 U.S. at 88 n.32.

those events have occurred that the true costs of the program in relation to the entire estate's worth will be known. And it will only be at that time that the issue of a taking can be adjudicated in either a suit by the Trustee under the Tucker Act, 28 U.S.C. § 1491, to recover funds expended, or on a contention by the Government in the reorganization proceeding itself that its claim under Section 110 of RITA has been improperly subordinated to that of the shareholders. Until the program is implemented, the Rock Island appellees' claims of a taking are premature, and thus, non-justiciable. *E.g., Hodel* v. *Virginia Surface Mining & Reclamation Assoc., Inc.*, Sup. Ct. No. 79-1538, decided June 15, 1981, slip op. at 26-31.

This conclusion is supported by this Court's decision in *Coffman* v. *Breeze Corporations, Inc.*, 323 U.S. 316 (1945), in which the Court concluded that a complainant did not present a justiciable issue when he sought to enjoin enforcement of, and to have declared unconstitutional, an Act of Congress. *Coffman* involved a suit by a patent owner against his licensees to enjoin their paying accrued royalties to the Government under the Royalty Adjustment Act of 1942,[14] and to have that Act declared unconstitutional. The lower courts had concluded that the suit should be dismissed for lack of equity jurisdiction and for want of a justiciable case or controversy; this Court affirmed. As the Court stated in explaining its ruling:

> So far as the present suit seeks a declaratory judgment or an injunction restraining payment of the royalties into the Treasury, it raises no justiciable issue. Appellant asserts in the present suit no right to recover the royalties. It asks only a determination that the Royalty Adjustment Act is unconstitutional and, if so found, that compliance with the Act be enjoined . . . . If contested, the validity of the Act would be an issue which, so far as it could ever become material, would properly arise only in a suit to

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[14] 56 Stat. 1013 (1942). That Act applied to government contracts and provided that the licensor must sue the United States to recover any reduced royalty payments which are claimed to be owed.

recover the royalties where it could be appropriately decided.

323 U.S. at 323-24. That case, appellant RLEA respectfully submits, is analogous to the case at bar.

As in *Coffman*, the Rock Island appellees are seeking to prevent an Act of Congress from being implemented. They are not, in reality, seeking to prevent any monies from being taken initially from the estate, but rather, are objecting to the estate's being required to borrow funds to comply with the statute, for it may subsequently be decided that such borrowings were unlawful. But, as in *Coffman*, that issue is more properly raised when either the government seeks to enforce its loan guarantee under Section 110 if RITA, or the shareholders, or the creditors if the assets otherwise available prove inadequate, bring an action against the Government under the Tucker Act to recover. Until the issue is joined in such a manner, a justiciable case or controversy has not been presented, and just as this Court should not address the constitutional issue of a taking at this time, an injunction to restrain enforcement of the Act, on that ground, was improper. *Coffman* v. *Breeze Corporation, Inc., supra.*

II. The Courts Below Improperly Enjoined On Fifth Amendment Grounds An Act of Congress, Which Congress Has Twice Declared To Be Essential To Rail Transportation, Since By Providing A Tucker Act Remedy To The Rock Island Estate, Congress Has Precluded A Finding That The Act Could Effect An Uncompensated Taking Of Property

Convinced that Congress had no right to require the Rock Island estate to aid its unemployed work force, the CRI reorganization court ruled that the statutory scheme twice devised by Congress should not be permitted to be implemented because, in the court's opinion, that program (notwithstanding the availability of a Tucker Act remedy), effected an unconstitutional taking of private property for public purposes. To prevent its implementation, the reorganization court exercised its equity powers and

preliminarily enjoined the enforcement of that Act even though Congress had twice declared that it intended its employee protective program to be implemented forthwith, notwithstanding any litigation over its validity, and that it considered its legislative program to be essential to the continuation of rail service to a substantial region of our country. Appellant RLEA respectfully submits that the reorganization court, and then the court of appeals by affirming that injunction, have abused their discretion, for they have completely frustrated the intent of Congress based upon a claim of an unconstitutional taking of property despite Congress' provision of compensation as required by the Fifth Amendment.

It is well settled that a request for an interlocutory injunction, such as that made by the Rock Island appellees in the cases at bar, is addressed to the discretionary and equitable powers of a court. *E.g., Virginia Petroleum Jobbers Assoc.* v. *FPC*, 259 F.2d 921 (D.C. Cir. 1958). Those discretionary powers, however, are neither "unfettered by meaningful standards [nor] . . . shielded from thorough appellate review." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 416 (1975). Rather, the courts have developed over the years a precise standard which requires a balancing of the equities involved with the probability for success on the merits. *E.g., American Medical Assoc.* v. *Weinberger*, 522 F.2d 921 (7th Cir. 1975). Moreover, when the moving party is attempting to enjoin an Act of Congress, the separation of powers doctrine (*see, Goldwater* v. *Carter*, 444 U.S. 996 (1979)) mandates that the Act be examined with a "presumption of constitutionality" and that the "burden" of upsetting that presumption be placed upon the party attacking its constitutionality. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). When those principles are applied to the injunction in No. 80-1239, it becomes apparent that the courts below have improperly enjoined the implementation of Sections 106 and 110 of RITA, as amended by the SRA.

A. By expressly providing that nothing in RITA shall limit the right of any person to commence an action under the Tucker Act, Congress precluded the finding that Sections 106 and 110 of RITA could effect an uncompensated taking of property

When the CRI reorganization court's rulings are examined to ascertain the precise basis for its decision to enjoin the implementation of Sections 106 and 110 of RITA, even as amended, it becomes apparent that the lower court enjoined the employee protective features of RITA because it did not accept the argument that Congress can, consistently with the Fifth Amendment, take property and provide the compensation required by that amendment through a subsequent Tucker Act suit. As the court explained:

> The argument that the Tucker Act is available and therefore we could go ahead with the unconstitutional taking because the Tucker Act will allow everything to turn out in the end really does not impress me. I share [counsel's] . . . comment, or argument, that you do not proceed, nor must the court allow proceedings under what is patently unconstitutional legislation because there is a remedy somewhere down the line that may straighten things out.

J.A. 202a-03a. In other words, the reorganization court enjoined implementation of Sections 106 and 110 of RITA, as amended, because it concluded that the Fifth Amendment requires the government to compensate an owner of property before it takes private property. Appellant RLEA respectfully submits that such a conclusion was error, for it is well settled that the Fifth Amendment "does not entitle [a property owner] to be paid in advance of the taking." *Hurley* v. *Kincaid*, 285 U.S. 95, 104 (1932).

Cited as one of the fundamental principles of common law (3 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1784 (1833)), the Fifth Amendment Taking Clause's protections are "designed to bar Government from forcing some people alone to bear public burdens which, in all fair-

ness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). To achieve the purpose of the Taking Clause, however, the government need not actually pay just compensation *before* a taking can occur; it is sufficient that at the time of taking the government has provided to the property owner a "reasonable, certain and adequate [means] to secure the just compensation . . . ." *Cherokee Nation* v. *Southern Kansas Ry., supra*, 135 U.S. at 659; *accord, Sweet* v. *Rechel*, 159 U.S. 380, 400-01 (1895). The Tucker Act remedy, 28 U.S.C. §§1346(a), 1491, has been held by this Court on many occasions to provide the just compensation required by the Taking Clause. *E.g., Dames & Moore* v. *Regan, supra*, slip op. at 30-31; *Rail Act Cases, supra*, 419 U.S. at 125-27; *accord, Duke Power Co.* v. *Carolina Environmental Study Group Inc., supra*, 438 U.S. at 94 n.39.

Prior to the passage of the Tucker Act in 1887, 24 Stat. 505, claims against the government could only be redressed by a petition to Congress because of sovereign immunity. Remarks of Rep. Springer, 18 Cong. Rec. 2680 (March 3, 1887). To avoid spending unnecessary time on matters which were more appropriately considered by a court of justice, and in order to follow the trend of that time of permitting suits against governments (*see*, H. Rpt. No. 1077, 49th Cong., 1st Sess. at 1, 3 (1886)), Congress enacted a bill to authorize "Suits Against the Government," which has since become known as the Tucker Act. By a provision in that Act, Congress expanded the jurisdiction of the Court of Claims by "engrafting" upon its prior jurisdiction the power to hear "'[c]laims founded upon the Constitution of the United States,' such as for just compensation for property taken for public use, &c." H. Rpt. No. 1077, *supra*, at 4. That jurisdiction still exists today, and as Congress provided in its SRA amendments to RITA, nothing in RITA should be read as withdrawing that remedy. 45 U.S.C. §1018(c), as amended.

When Congress, in the exercise of its powers under the Commerce Clause of the Constitution (Act. 1, §8, cl. 3), imposes a regulation designed to promote interstate com-

merce, that regulation, by definition, involves the adjustment of rights for the public good. *Andrus* v. *Allard*, 444 U.S. 51, 65 (1979). Since government need not regulate by "purchase" (*Id.*), Congress has the power to adjust the burdens and benefits of economic life (*e.g.*, *Usery* v. *Turner Elkhorn Mining Co.*, *supra*, 428 U.S. at 15-16), "subject only to the dictates" of justice and fairness. *Andrus* v. *Allard*, *supra*, 444 U.S. at 65. When Congress exceeds the bounds of permissible regulation, and by regulation effects a taking of property, the Taking Clause guarantees takeover and provide a cause of action to the affected property owner to obtain "just compensation" either on a claim founded upon the Constitution within the meaning of the Tucker Act's grant of jurisdiction to the Court of Claims, or based upon an implied promise to pay compensation, also within the jurisdiction of the Court of Claims. *Rail Act Cases*, *supra*, 419 U.S. at 126-27 (and cases cited therein). Since the Tucker Act provides the means to obtain compensation, the assailed action is neither unconstitutional nor enjoinable as causing an uncompensated taking. *E.g.*, *Dames & Moore* v. *Regan*, *supra*, *Hurley* v. *Kincaid*, *supra*.

In *Hurley* v. *Kincaid*, *supra*, this Court addressed the question of whether an injunction could issue to enjoin a taking by the government without prior compensation in asserted violation of the Fifth Amendment. The Court answered the question in the negative stating:

> For even if the defendants are acting illegally, under the Act, in threatening to proceed without first acquiring flowage rights over the complainant's lands, the illegality . . . is confined to the failure to compensate him for the taking, and affords no basis for an injunction if such compensation may be procured in an action at law. The 5th Amendment does not entitle him to be paid in advance of the taking.

285 U.S. at 104 (footnote omitted). The injunction in that case was set aside because the Court concluded that "the complainant has a plain, adequate and complete remedy at law"—*i.e.*, the Tucker Act. *Id.* at 105. That holding, appellant RLEA submits, is applicable and is controlling in the case *sub judice*

for like Kincaid, the estate has a remedy at law—the Tucker Act—to recover if a taking is subsequently found to have occurred.

When *Hurley* is applied to the injunction *sub judice*, it becomes apparent that the courts below improperly enjoined the implementation of Sections 106 and 110 of RITA, as amended. If, as the courts below concluded, Section 106 is a regulation which has become a taking, then Congress has impliedly promised to pay just compensation to the estate. 45 U.S.C. §1018(c). That implied promise makes the taking constitutional. Sections 106 and 110, therefore, are not enjoinable as effecting an uncompensated taking.

The Rock Island appellees' and the lower courts' concern with such a view of the compensation aspects of the Taking Clause is that it affronts their notions of fairness to permit the government to take private property and then say "sue me" to obtain the compensation due. J.A. 201a. Even in a situation where there is no justification for the government's refusal to accept a complainant's assertion that the assailed action is a taking, such a haughty attitude on the government's part does not make the assailed taking unconstitutional because the provision for compensation in the Tucker Act satisfies the guarantees of the Taking Clause. *E.g.*, *Stringer* v. *United States*, 471 F.2d 381, 383-84 (5th Cir. 1973). However, in the case at bar it cannot be contended that the government's action is "high-handed," for Congress reasonably and, appellant RLEA submits, correctly believed that the Rock Island estate has an obligation to protect its unemployed workers. Congress has insisted in RITA that the estate honor that obligation; but Congress has also provided in that Act an implied promise to pay just compensation if its view of the Rock Island's obligations is not sustained by the judiciary. Surely such an attitude is neither unreasonable nor high-handed; but more importantly, it is not in excess of Congress' powers nor in contravention of the guarantees of the Taking Clause.

B. Section 106 of RITA is not a regulation which, on its face, has become a taking of private property, for by investing in a railroad the Rock Island creditors and shareholders have assumed the risk that their interests will be subordinated to the interests of the public in protecting unemployed Rock Island employees

As shown by Argument I, *supra*, the validity of the taking was not properly before the lower courts, and is not before this Court, because it is premature and abstract at this time. Moreover, the availability of the Tucker Act remedy, as shown by Argument II (B), *supra*, makes a consideration of this issue inappropriate at this time. *See, Duke Power Co.* v. *Carolina Environmental Study Group Inc., supra*, 438 U.S. at 94 n.39. However, if this Court concludes that the taking issue is properly reviewable, appellant RLEA respectfully submits that the record in the cases at bar shows that the courts below improperly concluded that the Rock Island appellees stand a substantial chance of succeeding on the merits of their attack on the constitutionality of Sections 106 and 110 of RITA, as amended. Moreover, when the merits of the CRI appellees' arguments are balanced against the equities in this case, particularly with the public interest factors, it becomes apparent that the lower courts abused their discretion in enjoining the employee protection program of RITA.

Through its consideration of the injunctions *sub judice*, the CRI reorganization court asserted that its earlier conclusion that the Rock Island was no longer reorganizable (*see*, Sup. Ct. No. 80-1899) meant that, as a non-operating railroad, the Rock Island was no longer suffused with the public interest; the Rock Island had become simply "a private business with a lot of creditors which own some property and which is being liquidated for the benefit of creditors . . . ." J.A. 180a. Since the Rock Island estate was now private property, Congress, according to the reorganization court, could no longer look to the estate to "fund a legislatively created special benefits program" for unemployed Rock Island employees. J.A. 180a; *see also*, 153a, 155a. That view of the Act's validity was not

dependent upon the degree of the intrusion into the estate's assets (J.A. 155a), but rather, was premised upon the simple assertion that "Congress may not take private property to serve the public interest" (J.A. 156a), regardless of the amount appropriated or the reason for its expropriation. Appellant RLEA respectfully submits that the CRI reorganization improperly viewed the nature of the Rock Island estate and its relation to the public interest, and that once that relationship is viewed in its proper perspective, the injunction at bar becomes improvidently issued.

Congress' powers under the Commerce Clause of the Constitution are extensive and, indeed, have been stated to be plenary. *E.g., NRLB* v. *Fainblatt*, 306 U.S. 601,606 (1939); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824). When Congress exercises that power and prescribes regulations which adjust "the burdens and benefits of economic life," such legislative acts carry with them a "presumption of constitutionality," especially where Congress, as in the cases at bar, allocates "the interlocking economic rights and duties of employers and employees upon workmen's compensation principles . . . ." *Usery* v. *Turner Elkhorn Mining Co., supra*, 428 U.S. at 15. Moreover:

> A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends

Hodel v. *Indiana*, Sup. Ct. No. 80-231, decided June 15, 1981, slip op. at 7. Section 106 of RITA clearly has a rational basis and connection, for this Court has so held in other cases involving comparable employee protective provisions. *E.g., United States* v. *Lowden, supra*, 308 U.S. at 240; *ICC* v. *Railway Labor Executors' Assoc.*, 315 U.S. 373 (1942).

It has long been recognized that the railroad employee is an important, and indeed essential component of our national rail transportation system. Since the passage of the Emergency Railroad Transportation Act of 1933, 48 Stat. 211, Congress

has attempted to shield railroad employees from bearing the full burden of the economies which railroads could achieve in modifying their rail systems by requiring railroads to share the burden of the adverse consequences.[15] *E.g.*, Emergency Railroad Transportation Act of 1933, § 7, 48 Stat. 218; 49 U.S.C. §10903(b)(2); SRA § 227, 94 Stat. 1931 (*amending* 11 U.S.C. §1170, 1172(b)). It is now well settled that what the ICC said in *St. Paul Bridge & Terminal Ry.—Control*, 199 I.C.C. 588, 595 (1934), is equally true today, and supplies both the rational basis and the rational connection to shelter Section 106 from a due process attack:

> There is no definition here [in the predecessor provision to §11344] of the public interest. The language is broad enough to comprehend every public interest and the interest of every group or element of the public. . . . Since employees of railway companies are important elements of the railway transportation industry and of the communities in which railways operate, their interest in changes in management, ownership, or operation of the companies by which they are employed is manifest.

As this Court explained in *United States* v. *Lowden*, *supra*, 308 U.S. at 235-36:

> The now extensive history of legislation regulating the relations of railroad employees and employers plainly evidences the awareness of Congress that just and reasonable treatment of railroad employees is not only an essential aid to the maintenance of a service uninterrupted by labor disputes, but that it promotes efficiency, which suffers through loss of employee morale when the demands of justice are ignored.

Even when protective conditions are imposed upon an action taken to aid a carrier in reorganization survive, the requirement that a railroad provide economic protections to its em-

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[15] Congress has evidenced a concern for railroad employees for almost a century, beginning with the Arbitration Act of 1888 (*see*, C.M.R. Rehmus, *Railway Labor Act at Fifty*, pp. 1-22 (GPO 1977)), and including virtually every major act affecting railroads since 1920.

ployees, does not affront the Due Process Clause of the Fifth Amendment since "a business may be required to carry the burden of employee wastage incident to its operation . . . ." *United States* v. *Lowden, supra,* 308 U.S. at 240 (involving economic action of Rock Island predecessor while in reorganization).

Considerations involving employee interests, consequently, have been an integral part of the railroad industry for more than a half century, and any investor who has invested in that industry has done so with the clear understanding that his investment was subject to those interests. *Cf., Reconstruction Finance Corp.* v. *Denver & R.G.W.R.,* 328 U.S. 495 (1946). Conversely, workers have entered and have remained in the railroad industry with the clear understanding that loyal service to that industry will not be ignored (*e.g., United States* v. *Lowden, supra,* 308 U.S. at 234-36), and that, in exchange for that dedication, they will enjoy a form of guaranteed job security. *E.g.,* 49 U.S.C. §§10903(b)(2), 11347.

In this case, thousands of Rock Island employees relied upon those assurances and continued to work for that carrier, even though it was in reorganization, and even though to all but the naive its future prospects were grim. Congress was well aware of that dedication when, in enacting the MRRA and extending to the CRI court the power to authorize abandonments, it limited that power by providing that: "In authorizing any abandonment pursuant to [Section 17(a)] . . . , the court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under section 11347 of title 49." 45 U.S.C. § 915(a). It was to assure that its intent in qualifying Section 17(a) of the MRRA was honored, and that some form of immediate protective benefits were made available to needy Rock Island employees, that Congress enacted Section 106 of RITA. Surely, the Rock Island appellees have not shown that Congress lacked a rational basis for concluding in Sections 102(1) and (2) of RITA, 45 U.S.C. §1001(1), (2), that its provision of aid for unemployed Rock Island employees was reasonably

related to rail transportation in the Rock Island region. Nor can it be asserted that Congress erred in concluding that the means it chose to accomplish its objectives was reasonably related to the ends it sought to obtain.

Apparently recognizing that Section 106 is a permissible regulation for a railroad, the Rock Island appellees and the reorganization court argue that the statute in question is now an impermissible regulation because the Rock Island is being liquidated. J.A. 180a. That argument, however, ignores the fact that the Rock Island estate will continue to be important to the public interest for so long as it owns or possesses tracks which are essential to or needed for rail service. Indeed, it was to provide for an orderly transition from Rock Island operations to service by other carriers that Congress enacted RITA. 45 U.S.C. §1001. And to achieve that end, Congress concluded that unemployed Rock Island employees must receive economic protections to assure a steady and sure supply of labor for all railroads. *See*, H.R. 7235, § 227(c), 126 Cong.Rec. H8619 (September 9, 1980); H. Rpt. No. 96-1430, *supra*, at 138-39. Surely, Congress' conclusion cannot be said to be unreasonable. *E.g., Usery* v. *Turner Elkhorn Mining Co., supra.*

Nevertheless, the CRI reorganization court concluded that Section 106 of RITA effected a taking because, in the court's opinion, "justice and fairness" required that the public, and not the Rock Island creditors, pay for the public good which Congress hoped to achieve from enacting that section. J.A. 180a-81a. However, when that assertion is examined critically, it fails because the Rock Island creditors and shareholders have no "property right" which is being "taken" by Section 106. In light of certain decisions by the ICC,[16] those parties may have had a faint hope that the estate might possibly es-

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[16] *E.G., Wellsville, A.& G.R.—Abandonment*, 354 I.C.C. 744 (1978); *but see, In re Penn Central Transp. Co.*, 347 I.C.C. 45, 92 (1973); H. Rpt. 96-839, *supra*, at 63-66 (letter from ICC General Counsel).

cape its obligations under 49 U.S.C. §10903(b)(2) or 45 U.S.C. § 915(a) to aid employees, but that expectation was not "sufficiently bound up with the reasonable expectations [of a property owner] . . . to constitute 'property' for Fifth Amendment Purposes." *Penn Central Transportation Co.* v. *New York City, supra,* 438 U.S. at 125.

Railroads are *sui generis* in that they are a private enterprise suffused with the public interest. That public interest enabled the railroads, including the Rock Island's predecessors, to obtain much of the land on which their tracks lie today. *E.g.*, Speech of Rep. John A. Anderson, 18 Cong. Rec. (Appendix) 137-38 (February 28, 1887); Kansas Statutes Ann. § 66-501; *see generally,* F. Wilner, *Competitive Equity* at 28-31 (Assoc. of American R.R., 1981). Indeed, the railroads were able to obtain their right of ways because Congress and the various States considered railroads essential to the public interest. *See,* Act of July 1, 1862, 37th Cong., 2d Sess., ch. 120, §18, 12 Stat. 497. Congress and the States nurtured the railroads and provided the necessary regulations, legislative assistance and financial support to aid their economic survival; the Rock Island and its predecessors received part of that aid. *E.g., Chicago, R.I. & P. Ry.—Reconstruction Loan,* 184 I.C.C. 597 (1932); *Loan to Chicago, R.I. & P. Ry.* 65 I.C.C. 224, 371 (1920). Consequently, every mile of track and each piece of equipment possessed by the CRI estate is impregnated with the public interest.

While investors in a railroad "cannot be called upon to sacrifice their property so that a depression-proof railroad system might be created" *(Reconstruction Finance Corp.* v. *Denver & R.G.W. R., supra,* 328 U.S. at 535; *see also, Brooks-Scanlon Co.* v. *Railroad Comm.*, 251 U.S. 396 (1920)), it is also true that the protection of railroad creditors' and shareholders' property interests "do not command Procrustean measures." *Penn-Central Merger Cases,* 389 U.S. 486, 511 (1968). By investing in a railroad that owes an obligation to the public, the creditors and shareholders in this case have "assumed the risk that in any depression or any reorganization

the interests of the public would be considered as well as theirs." *Reconstruction Finance corp.* v. *Denver & R.G.W. R., supra,* 328 U.S. at 536; *New Haven Inclusion Cases,* 399 U.S. 392, 491-92 (1970).

In this case, before the CRI reorganization court ordered the liquidation of the debtor, Congress had legislated that the interests of employees must be considered and must be protected whenever the court authorized any abandonment of lines or discontinuance of service. MRRA, § 17(a), 45 U.S.C. § 915(a). That obligation existed before RITA was enacted, and while Section 106 of RITA attempted to assure that the Rock Island estate honored its obligation to protect CRI employees, Congress also conferred a benefit upon the estate "by reducing the potential for extremely expensive labor protection claims." H. Rpt. No. 96-839, *supra,* at 22. Since the obligation to protect employees existed as an integral part of the investment in a regulated industry, the creditors and shareholders cannot now assert that Section 106 is, on its face, a regulation which has become a taking.

What was ignored by the CRI reorganization court in its rush to protect the Rock Island creditors and investors, is the fact that whatever jurisdiction it has over the Rock Island estate, including the complaint in the cases at bar, comes from Section 77 of the Bankruptcy Act. That Act requires the reorganization court to perform a balancing feat each time it passes on a question; it must conserve the debtor's assets for the benefit of creditors and at the same time serve the public interest in continued rail transportation. *E.g., New Haven Inclusion Cases, supra,* 399 U.S. at 431; *see also,* 11 U.S.C. §1165, made applicable here by Section 403(b), Pub. L. No. 95-598, 92 Stat. 2683 (1978). Consequently, when the lower courts addressed the request by the Rock Island appellees to enjoin the implementation of an Act which Congress has twice declared to be essential to that public interest, the courts should have, on the facts of these cases, deferred to the will of Congress, for as this Court has observed before:

> When the public interest, as distinguished from private, bulks large in the problem, the solution is largely a func-

> tion of the legislative and administrative agencies of government with their facilities and experience in investigating all aspects of the problem and apprising the general interest.

Ecker v. *Western Pac. R.*, 318 U.S. 448, 468 (1943) (footnote omitted). When that principle is applied to this case, it becomes apparent that not only is the public interest not served by the injunction at bar, but rather, the public interest requires that the injunction be set aside so that the employee protection program of RITA can be implemented as quickly as possible.

CONCLUSION

For the reasons set forth above, appellant RLEA respectfully submits that this Court should vacate the preliminary injunction in No. 80-1239, and should remand this case with instructions to dismiss the complaint for injunctive relief. Also, appellant respectfully submits that its appeal in No. 80-415 is now moot, and suggests that this Court note probable jurisdiction and vacate the interlocutory order therein.

Respectfully Submitted,

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APPENDIX

APPENDIX A

Constitutional Provisions And Statutes Relied Upon

1. *Fifth Amendment To The Constitution Of The United States*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

2. *Rock Island Transition and Employee Assistance Act, Pub. L. No. 96-254, as originally enacted, and as amended by Pub. L. No. 96-448**

A. Sec. 106, 45 U.S.C. §1005	Sec. 106, as amended, 45 U.S.C. §1005
Employee Protection Agreements	Employee Protection Agreements
(a) No later than [10] days after the date of enactment of [this] Act, in order to avoid disruption of rail service and undue displacement of employees, the Rock Island Railroad and labor organizations representing the	(a) No later than *5* days after the date of enactment of the *Staggers Rail* Act *of 1980*, in order to avoid disruption of rail service and undue displacement of employees, the Rock Island Railroad and labor organiza-

* Those portions of the original Act deleted when amended by Pub.L. No. 96-448 are marked by brackets; those portions of the amended Act added by Pub.L. No. 96-448 are marked by italics.

As originally enacted	As amended
employees of such railroad, with the assistance of the National Mediation Board, may enter into an agreement providing protection for employees of such railroad who are adversely affected as a result of a reduction in service by such railroad. Such employee protection may include, but need not be limited to, employee relocation incentive compensation, moving expenses, and separation allowances.	tions representing the employees of such railroad with the assistance of the National Mediation Board, may enter into an agreement providing protection for employees of such railroad who are adversely affected as a result of a reduction in service by such railroad. Such employee protection may include, but need not be limited to, employee relocation incentive compensation, moving expenses, and separation allowances.
(b) If the Rock Island Railroad and the labor organizations representing the employees of such railroad are unable to enter into an employee protection agreement under subsection (a) of this section within [10] days after the date of enactment of [this] Act, the [parties shall immediately submit the matter] to the Commission. The Commission shall impose upon the parties by appropriate order a fair and equitable arrangement with respect to employee protection no later than [30] days after the date of enactment	(b) If the Rock Island Railroad and the labor organizations representing the employees of such railroad are unable to enter into an employee protection agreement under subsection (a) of this section within *5* days after the date of enactment of *the Staggers Rail* Act *of 1980*, the *matter shall be immediately submitted* to the Commission. The Commission shall impose upon the parties by appropriate order a fair and equitable arrangement with respect to employee protection no later than *15* days after the date of

As originally enacted	As amended
of [this] Act, unless the Rock Island Railroad and the authorized representatives of its employees have by then entered into a labor protection agreement. For purposes of this subsection, the term "fair and equitable" means no less protective of the interests of employees than protection [afforded under] section 9 of the Milwaukee Railroad Restructuring Act (45 U.S.C. 908), subject to the limitations set forth in section 110 of this title.	enactment of *the Staggers Rail* Act *of 1980*, unless the Rock Island Railroad, and the authorized representatives of its employees have by then entered into a labor protection agreement. For purposes of this subsection, the term "fair and equitable" means no less protective of the interests of employees than protection *established by and pursuant to* section 9 of the Milwaukee Railroad Restructuring Act (45 U.S.C. 908), subject to the limitations set forth in section 110 of this title.
(c) If an employee protection arrangement is imposed by the Commission under subsection (b) of this section, the bankruptcy court shall immediately authorize and direct the Rock Island Railroad trustee to, and the Rock Island Railroad trustee and the labor organizations representing the employees of the railroad shall, immediately implement such arrangement.	(c) If an employee protection arrangement is imposed by the Commission under subsection (b) of this section, the bankruptcy court shall immediately authorize and direct the Rock Island Railroad trustee to, and the Rock Island Railroad trustee and the labor organizations representing the employees of the railroad shall, immediately implement such arrangement.
(d)[(1)] An order of the Commission under subsection	(d) An order of the Commission under subsection

As originally enacted	As amended
(b) of this section [may not be stayed by the Commission or by any court, and an order of the bankruptcy court under subsection (c) of this section may not be stayed by any other court.]	(b) of this section *and any order of the bankruptcy court under subsection (c) of this section may be appealed only to the United States Court of Appeals for the Seventh Circuit.* Any such appeal to such court of appeals shall be filed within 5 days after the date of entry of the order of the Commission or the bankruptcy court, as the case may be, and such court of appeals shall finally determine such appeal within 60 days after the date such appeal is filed.
[(2) Any order described in paragraph (1) of this subsection may be appealed only to the court of appeals of the United States having jurisdiction to review decisions and orders of the bankruptcy court.] Any such appeal to such court of appeals shall be filed within 5 days after the date of entry of the order of the Commission or the bankruptcy court, as the case may be, and such court of appeals shall finally determine such appeal within 60 days after the date such appeal is filed. [No determination by the court of appeals under this subsection may be reviewed in any other court.]	
(e) (1) Any claim of an employee for benefits and allowances under an employee protection agreement or arrangement entered into under this section shall	(e)(1) Any claim of an employee for benefits and allowances under an employee protection agreement or arrangement entered into under this section shall

As originally enacted	As amended
be filed with the Board in such time and manner as the Board by regulation shall prescribe. The Board shall determine the amount for which such employee is eligible under such agreement or arrangement and shall certify such amount to the Rock Island Railroad for payment.	be filed with the Board in such time and manner as the Board by regulation shall prescribe. The Board shall determine the amount for which such employee is eligible under such agreement or arrangement and shall certify such amount to the Rock Island Railroad for payment.
(2) Benefits and allowances under such agreement or arrangement entered into under this section shall be paid by the Rock Island Railroad from its own assets or in accordance with section 110 of this title, and claims of employees for such benefits and allowances shall be treated as administrative expenses of the estate of the Rock Island Railroad.	(2) Benefits and allowances under such agreement or arrangement entered into this section shall be paid by the Rock Island Railroad from its own assets or in accordance with section 110 of this title, and claims of employees for such benefits and allowances shall be treated as administrative expenses of the estate of the Rock Island Railroad.
(f) The first sentence of section 7(b)(7) of the Railroad Retirement Act of 1974 (45 U.S.C. 231f(b)(7)) is amended by striking out "and the Milwaukee Railroad Restructuring Act" and inserting in lieu thereof ", the Milwaukee Railroad Restructuring Act, and the Rock Island Railroad Transition and Employee Assistance Act".	(f) The first sentence of section 7(b)(7) of the Railroad Retirement Act of 1974 (45 U.S.C. 231f(b)(7)) is amended by striking out "and the Milwaukee Railroad Restructuring Act" and inserting in lieu thereof ", the Milwaukee Railroad Restructuring Act, and the Rock Island Railroad Transition and Employee Assistance Act."

As originally enacted	As amended
B. Sec. 110, 45 U.S.C. §1008	Sec. 110, as amended, 45 U.S.C. §1008
Obligation Guarantees	Obligation Guarantees
(a) The Secretary, under the authority of section 511 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 831), shall guarantee obligations of the Rock Island Railroad for purposes of providing employee protection in accordance with the terms of any employee protection agreement or arrangement entered into under section 106 of this title.	(a) The Secretary, under the authority of section 511 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 831), shall guarantee obligations of the Rock Island Railroad for purposes of providing employee protection in accordance with the terms of any employee protection agreement or arrangement entered into under section 106 of this title.
(b) Any obligation guaranteed pursuant to this section shall be treated as an administrative expense of the estate of the Rock Island Railroad.	(b) Any obligation guaranteed pursuant to this section shall be treated as an administrative expense of the estate of the Rock Island Railroad.
(c) The aggregate unpaid principal amount of obligations which may be guaranteed by the Secretary pursuant to this section shall not exceed $75,000,000.	(c) The aggregate unpaid principal amount of obligations which may be guaranteed by the Secretary pursuant to this section shall not exceed $75,000,000.
(d) The total liability of the Rock Island Railroad in connection with benefits and	(d) The total liability of the Rock Island Railroad in connection with benefits and

As originally enacted	As amended
allowances provided under any employee protection agreement or arrangement entered into under section 106 of this title shall not exceed $75,000,000.	allowances provided under any employee protection agreement or arrangement entered into under section 106 of this title shall not exceed $75,000,000.
(e) Except in connection with obligations guaranteed under this section, the United States shall incur no liability in connection with any employee protection agreement or arrangement entered into under section 106 of this title.	(e) Except in connection with obligations guaranteed under this section, the United States shall incur no liability *to employees* in connection with any employee protection agreement or arrangement entered into under section 106 of this title.
(f) Section 511(g) and section 516 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 831(g) and 836) shall not apply to any obligation guaranteed under this section.	(f) Section 511(g) and section 516 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 831(g) and 836) shall not apply to any obligation guaranteed under this section.

C. Section 124 (c), as added by Pub.L. No. 96-448, 45 U.S.C. §1018 [no comparable provision in RITA, as originally enacted].

Sec. 124. (c) Nothing in this Act or in the Milwaukee Railroad Restructuring Act (45 U.S.C. 901 et seq.) shall limit the right of any person to commence an action in the United States Court of Claims under section 1491 of title 28, United States Code (commonly referred to as the Tucker Act).

APPENDIX B

List of RLEA Member Organizations

American Railway & Airway Supervisors Association, Division of BRAC
American Train Dispatchers Association
Brotherhood of Locomotive Engineers
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen
Brotherhood of Railway, Airline and Steamship Clerks
Brotherhood Railway Carmen of the United States and Canada
Hotel & Restaurant Employees & Bartenders International Union
International Association of Machinists and Aerospace Workers
International Brotherhood of Boilermakers and Blacksmiths
International Brotherhood of Electrical Workers
International Brotherhood of Firemen & Oilers
International Longshoremen's Association
International Organization of Masters, Mates and Pilots
National Marine Engineers Beneficial Association
Railroad Yardmasters of America
Railway Employes Department, AFL-CIO
Sheet Metal Workers' International Association
Seafarers International Union of North America
Transport Workers Union of America
United Transportation Union

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Nos. 80-415 and 80-1239

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant,

v.

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; HENRY CROWN, et al.; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and ANDREW L. LEWIS, JR., Secretary of Transportation,
Appellees.

Consolidated Appeals From The United States District Court For The Northern District Of Illinois And From The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE ROCK ISLAND APPELLEES

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September 26, 1981

QUESTIONS PRESENTED[1]

1. Whether the reorganization court's order of October 15, 1980, continuing in effect a preliminary injunction enjoining implementation of the labor protection program of the Rock Island Act, is properly before this Court and ripe for review.

2. Whether the provisions of the Rock Island Act, which require the reorganization court to impose retroactively a new employee protection obligation of up to $75 million to be paid the former employees of a single bankrupt, cashless and non-operating railroad, constitute a taking of private property without just compensation, a deprivation of property without due process of law, a departure from the separation of powers doctrine and a violation of the constitutional mandate that bankruptcy laws be "uniform . . . throughout the United States."

3. Whether the mere possibility of a later Tucker Act claim against the United States bars the Rock Island estate from obtaining injunctive relief against unconstitutional conduct.

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[1]Parent Companies, Subsidiaries and Affiliates of the Rock Island appellees are listed in Appendix A, *infra*.

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Appellees.

Consolidated Appeals From The United States District Court For The Northern District Of Illinois And From The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE ROCK ISLAND APPELLEES

This brief is submitted on behalf of appellees William M. Gibbons, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Continental Illinois National Bank and Trust Company of Chicago and The First National Bank of Chicago, as Indenture Trustees for the income debenture holders and first mortgage bondholders respectively, and Henry Crown, *et al.*, substantial holders of first mortgage bonds, income debentures and common stock of the Rock Island.

JURISDICTION

No. 80-415. The district court's order from which appeal No. 80-415 is taken was entered on June 9, 1980. Appellant RLEA[2] filed a notice of appeal from that order under 28 U.S.C. § 1252 on June 11, 1980. (J.A. 10a.) On June 20, 1980, RLEA joined in a motion by the United States and the Interstate Commerce Commission (the "Commission" or "I.C.C.") requesting the district court to vacate its June 9 order. (J.A. 10a, 169a.) By that timely motion to vacate, RLEA's earlier notice of appeal was nullified and dissolved. Fed. R. App. P. 4(a)(4);[3] Sup. Ct. R. 11.3; 9 MOORE'S FEDERAL PRACTICE ¶ 204.12[1], at 4-65 n.17 (2d ed. 1980). RLEA never filed a timely notice of appeal following the district court's denial of the June 20, 1980 motion to vacate. 28

[2]The abbreviations used in this brief conform to the abbreviations employed in the briefs of appellant RLEA and the federal appellees except where otherwise noted. The Government defendants (the United States, the Secretary of Transportation and the Interstate Commerce Commission) did not file an appeal in No. 80-1239 and are thus technically appellees although they support the appellant RLEA. To avoid confusion, both the Government defendants and the RLEA are referred to as appellants, and Mr. Gibbons (the Trustee of the Rock Island) and the creditors and shareholders are referred to as appellees. When necessary to distinguish the RLEA from the Government defendants, the latter will be referred to as the "Government."

References to the Joint Appendix are designated "J.A." References to the Appendix to the Jurisdictional Statement in No. 80-415 are designated "80-415 J.S.App." References to the opening briefs of RLEA and the Government are designated "RLEA Br." and "Govt. Br." respectively.

[3]Rule 4(a)(4) provides in part:

> "If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party . . . (iii) under Rule 59 to alter or amend the judgment . . . the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above."

U.S.C. § 2101. Although the Government filed a timely notice of appeal to this Court from the June 20 ruling, it did not docket its appeal. Thus, jurisdiction of this Court does not lie in No. 80-415.

No. 80-1239. The judgment of the court of appeals in No. 80-1239, affirming Judge McGarr's October 15, 1980 order continuing in effect the June 9 injunction, was entered on December 16, 1980. (J.A. 210a.) RLEA filed its notice of appeal to this Court on December 19, 1980 (J.A. 16a), and the appeal was docketed on January 21, 1981. The jurisdiction of this Court in No. 80-1239 is based on 28 U.S.C. § 1252.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the constitutional provisions and statutes listed by the appellants (RLEA Br. 4 and App. A), the appellees also rely upon the uniformity provision in the Bankruptcy Clause of the United States Constitution, art. I, §8, cl. 4. That clause provides that "[t]he Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States. . . ."

STATEMENT

Course of Proceedings Below

No. 80-415. On June 5, 1980, appellees initiated this action in the United States District Court for the Northern District of Illinois challenging the constitutionality of the labor protection provisions of the Rock Island Transition and Employee Assistance Act, Pub. L. No. 96-254, 94 Stat. 399, codified at 45 U.S.C. §§ 1001-1018 (the "original Rock Island Act"), enacted into law on May 30, 1980. (J.A. 21a-42a.) After a hearing on the appellees' motion for a preliminary injunction, District Judge (now Chief Judge) Frank J. McGarr granted the injunction, finding a

probability that the original Rock Island Act's labor protection provisions would violate the Fifth Amendment rights of the Rock Island estate, its creditors and its shareholders and, if implemented, would cause irreparable injury to the estate. (J.A. 151a-158a.) Appellants thereupon unsuccessfully moved in the district court to vacate the preliminary injunction (J.A. 161a-184a), and then in this Court for a stay, *RLEA v. Gibbons*, 448 U.S. 1301 (Stevens, Circuit Justice) (opinion denying stay application); 448 U.S. 909 (1980) (order of the Court denying stay application). RLEA filed a notice of appeal from Judge McGarr's order granting a preliminary injunction but not from his subsequent order of June 20, 1980 denying appellants' motion to vacate that injunction. (80-415 J.S.App. 23a.) See *supra* at 2-3. On April 27, 1981, this Court postponed further consideration of the question of jurisdiction over appeal No. 80-415 to the hearing of the case on the merits. *RLEA v. Gibbons*, 101 S.Ct. 2014 (1981).

No. 80-1239. On September 29, 1980, Congress enacted Section 701 of the Staggers Rail Act of 1980, Pub. L. No. 96-448, Title VII, § 701, 94 Stat. 1959 (the "Staggers Act"), which reenacted and amended the labor protection provisions of the original Rock Island Act which had earlier been found to be unconstitutional.[4] Thereafter, appellants unsuccessfully moved in the district court to vacate the June 9 preliminary injunction (J.A. 185a-209a), then in the Seventh Circuit Court of Appeals to stay that injunction (J.A. 16a-17a), and finally in this Court for a stay, *RLEA v. Gibbons* (Stevens, Circuit Justice, Jan. 27, 1981) (unpublished order denying stay application); 101 S.Ct. 1344 (Feb. 23, 1981) (order of the Court denying stay application).

In accordance with the expedited review procedures of the Rock Island Act, an appeal from Judge McGarr's refusal to vacate his preliminary injunction was taken to the United States

[4]Unless otherwise indicated, reference to the "Rock Island Act" is to the original Rock Island Act as amended by the Staggers Act.

Court of Appeals for the Seventh Circuit. The court of appeals affirmed Judge McGarr's decision by a 3 to 3 vote. (J.A. 210a-211a.) RLEA appealed to this Court, which noted probable jurisdiction of appeal No. 80-1239 on April 27, 1981. *RLEA v. Gibbons*, 101 S.Ct. 2014 (1981).

Statement of Facts

The Erosion Of The Rock Island Estate In Reorganization

After a decade of losses totalling $103.4 million (J.A. 361a), the Rock Island entered reorganization under Section 77 of the Bankruptcy Act of 1898, 11 U.S.C. § 205, on March 17, 1975. Judge McGarr presided over the proceedings from the outset. At his direction, the Trustee continued rail operations for the next four and one-half years despite staggering losses. (J.A. 151a-152a, 261a-263a, 392a.)[5] At year-end 1975, the end of the first year of reorganization, the Trustee reported to the Commission that the estate had total assets of $441,126,044. (J.A. 296a.) During the reorganization years from 1975 through 1980, the Rock Island estate suffered net losses totalling $210,627,230.

By the summer of 1979, Rock Island's cash reserves had dwindled to the point that the Trustee could no longer pay his operating expenses. *See* Appendix A to *Kansas City Terminal Railway—Operate—Chicago, Rock Island & Pacific Railroad* (*"Directed Service Order No. 1398"*), 360 I.C.C. 289, 316, 322

[5]The Trustee reported these accelerating losses to the Commission:

Year	Net Losses
1975	$31,165,906
1976	5,186,918
1977	20,093,107
1978	17,178,002
1979	93,860,096
1980	43,143,201

(J.A. 300a, 307a, 313a, 320a, 330a.)

(1979). Cash and short-term investments of the Rock Island declined from a level consistently above $16 million in the reorganization years of 1975 through 1978 to only $3 million on June 30, 1979. (J.A. 374a.) At the same time, the Trustee reported a rapidly growing net working capital deficit of $52.2 million on June 30, 1979. (J.A. 371a.)

Labor's Role In The Reorganization Proceedings

During the first five years of reorganization, during which the Rock Island estate suffered enormous erosion, its employees continued to be employed by the Rock Island at a cost to the estate of almost $1 billion in wages and benefits. (J.A. 25a, 111a.) As part of his efforts to achieve an income-based reorganization, the Trustee sought more efficient work rules agreements with the labor organizations representing Rock Island employees. He anticipated that the cost savings from these work rules changes would fund the substantial wage increases sought by the unions. Thus, in April, 1977, the Trustee informed the unions that he could not agree to large wage increases without concurrently eliminating antiquated work rules and featherbedding. (J.A. 278a-279a.) Thirteen of the unions, representing a limited number of Rock Island employees, reached agreements with the Trustee to take effect prospectively. (J.A. 279a-280a.)

Despite the Rock Island's bleak financial condition, the two unions representing the largest number of Rock Island employees, Brotherhood of Railway and Airline Clerks ("BRAC") and United Transportation Union ("UTU") (both represented in these proceedings by RLEA), refused to agree to work rules changes and insisted that their members be given significant wage increases, with retroactive application, which the Trustee said the estate could not afford. (J.A. 279a-281a.)

On August 28, 1979, BRAC, and the next day UTU, struck the Rock Island. (J.A. 277a.) In order to achieve an orderly shutdown of operations, the Trustee issued notices of discharge or suspen-

sion to his contract employees in accordance with their collective bargaining agreements.

On September 20, 1979, the President of the United States declared a state of emergency and mandated a return to work by the striking Rock Island employees by appointing an Emergency Board pursuant to Section 10 of the Railway Labor Act, 45 U.S.C. § 160. Exec. Order No. 12,159, 44 Fed. Reg. 54687 (1979). The unions did not, however, order their members to comply with the Presidential order and return to work. (J.A. 215a-217a, 278a.)

The depleted cash reserves of the Rock Island were quickly exhausted by the strike. On September 26, 1979, acting pursuant to 49 U.S.C. § 11125,[6] the Commission directed the Kansas City Terminal Railway Company to operate and provide rail service over the lines of the Rock Island based upon "the specific finding that [the Rock Island's] cash position makes its continuing operation impossible." *Directed Service Order No. 1398, supra*, 360 I.C.C. at 290. By virtue of that order, the Kansas City Terminal

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[6]Section 11125 in pertinent part provides as follows:

"(a) When a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title cannot transport the traffic offered to it because—

"(1) its cash position makes its continuing operation impossible;

* * *

"the Commission may direct the handling, routing, and movement of the traffic available to that carrier and its distribution over the railroad lines of that carrier by another carrier to promote service in the interest of the public and of commerce.

* * *

"(b)(5) A directed carrier may apply to the Commission for payment of an amount equal to the amount by which (A) the total expenses of that carrier incurred . . . exceed (B) the direct revenues from handling, routing, and moving that traffic over the lines of the other carrier during that period."

Railway Company conducted rail operations over Rock Island lines until March, 1980, for which it was subsidized by the Federal government.

Despite the implementation of subsidized directed service by the Commission, the Rock Island workers represented by BRAC refused to return to work until the Commission agreed that their entire membership would be employed in directed service operations, regardless of need. (J.A. 289a, 293a-294a.) This had the effect of materially increasing the cost of directed service operations to the Government. As a result of the Commission's directed service orders, the employment of most Rock Island workers was extended for an additional six months. (J.A. 31a, 111a.)

The Rock Island's Withdrawal From Rail Carrier Operations

The Rock Island estate remained cashless and continued to erode during the period of directed service. *See St. Louis Southwestern Railway—Temporary Authority—Chicago, Rock Island & Pacific Railroad*, 360 I.C.C. 729, 735-36 (1980). On December 28, 1979, the Trustee filed his Plan of Reorganization, which called for a reorganization built around an operating core railroad. (J.A. 5a.) On January 21, 1980, Peat, Marwick, Mitchell & Co., the reorganization court's independent expert, filed its report, which concluded that the Rock Island was not reorganizable as an operating railroad even if pared to its most profitable core. (J.A. 333a, 343a, 221a.) At hearings conducted by Judge McGarr on January 23 and January 25, 1980, the creditors and shareholders, joined by counsel for the Federal Railway Administration, speaking also for the Commission, urged the court to reject the Trustee's plan and to order the liquidation of the Rock Island in the public interest. (J.A. 226a-236a.)

On January 25, 1980, Judge McGarr concluded that "a continuation of the Rock Island on an income producing basis, whether in core or in whole or in part . . . is just not possible. . . . " (J.A. 240a.) He instructed the Trustee to abandon efforts to reorganize

the Rock Island as an ongoing railroad and to commence its liquidation. (J.A. 239a- 240a.) The Trustee was thereupon directed to sell all of the remaining assets of the estate and to prepare a plan for distribution of the proceeds of the sale to the estate's secured creditors and, if possible, its other creditors and shareholders.

Judge McGarr's liquidation order was affirmed by the United States Court of Appeals for the Seventh Circuit, which held that "the history of this case indicates that the reorganization court has duly considered the public interest and has determined that continued operation of the Rock Island no longer serves the public interest." *In re Chicago, Rock Island & Pacific Railroad*, No. 80-1353 (7th Cir. Feb. 11, 1980) (J.A. 377a, 387a-388a, 392a), *petition for cert. filed sub nom. RLEA v. Gibbons*, 49 U.S.L.W. 3883 (U.S. May 12, 1981) (No. 80-1899). Following the entry of Judge McGarr's January 25, 1980 order, the Trustee began, and has continued, liquidating the Rock Island Railroad.

On April 14, 1980, the Trustee petitioned Judge McGarr to confirm the Rock Island's total abandonment of all rail lines and operations.[7] On that date, Judge McGarr referred the petition to the Commission for its recommendation and announced that he would rule on the petition and issues relating to that petition, including labor protection, on June 2, 1980. (J.A. 241a-248a.) On May 23, 1980, the Commission concluded that "abandonment of the Rock Island and its dissolution as an operating railroad is required by the public convenience and necessity . . . [and that] fairness to its creditors and shareholders dictates that the carrier be liquidated." *Chicago, Rock Island & Pacific Railroad—Abandonment*, 363 I.C.C. 150, 152 (1980).

Addressing the question of whether labor protection should be imposed as a condition to abandonment, the Commission express-

[7] In 1979 Congress transferred jurisdiction to confirm the total abandonment of the Rock Island from the Commission to the reorganization court. See *infra* at 29.

ly deferred to the reorganization court's jurisdiction to decide that issue. The Commission did, however, point to its own long-standing practice of not imposing any labor protection conditions in cases of total line abandonments (363 I.C.C. at 161):

> In past instances where entire rail systems have been abandoned and no company would reap the benefits of the abandonment, we have found the imposition of employee protective conditions not to be warranted. *See, Wellsville, Addison & Galeton R. Corp.—Abandonment*, 354 I.C.C. 744, 746 (1978).

Judge McGarr confirmed the total abandonment of all Rock Island lines and service on June 2, 1980, characterizing his ruling as a "technical recognition" of the existing state of affairs. (J.A. 264a.) Judge McGarr reaffirmed his earlier January, 1980 determination that the Rock Island was entitled to withdraw its assets from further devotion to rail service in the public interest. He found (J.A. 270a):

> Rock Island's unconditional discontinuance of service and its total system abandonment is constitutionally mandated and . . . that to force a railroad to continue operations indefinitely at a loss in order that the public may be served is a violation of the Fifth Amendment rights of those who have a security interest in the enterprise. *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396 (1920).

Judge McGarr also rejected RLEA's request that labor protection conditions be imposed in connection with the Rock Island's abandonment:

> The Court [has] found that labor protective conditions or arrangements are not required of Rock Island's estate pursuant to Section 17 of the [Milwaukee Road Restructuring Act] by reason of Rock Island's systemwide termination of operations and total line abandonment which do not warrant further consumption of Rock Island's assets for protection payments to employees whose jobs with Rock Island are no longer in existence by reason of such total abandonment and operational discontinuance. . . . [C]onsistent with ICC

> precedent, with the Rock Island's constitutional right to abandon its lines and discontinue its service, and with the equities of the Rock Island situation, no labor protection arrangements may be imposed on the Rock Island estate.

(J.A. 270a-27la, citations omitted.)[6]

The Original Rock Island Act

In response to the reorganization court's liquidation order, Congress enacted legislation which attempted to impose upon the Rock Island estate the cost of a new "protection" scheme for its former employees. The original Rock Island Act was signed by President Carter on May 30, 1980—four months after the entry of the liquidation order, 45 days after the confirmation of abandonment was requested, one week after the Commission reported to Judge McGarr that it concurred in his decision to liquidate the Rock Island, and three days before Judge McGarr's expected confirmation of abandonment. The labor protection scheme is contained in Sections 106 and 110 of the Act.

The original Rock Island Act imposed up to $75 million in new employee protection obligations on the Rock Island estate. It required that the labor protection program be funded either directly from the assets of the estate or by a federally guaranteed loan. The loan obligation would have "administrative expense" status. Thus, repayment of the loan would give the Government priority over the interests of unsecured creditors and shareholders and possibly over the interests of secured creditors, including the first mortgage bondholders.[7]

[6]RLEA subsequently appealed the district court's June 2 order to the United States Court of Appeals for the Seventh Circuit. The court of appeals twice denied RLEA's motion for a stay of the abandonment order. *In re Chicago, R.I. & P.R.R.*, No. 80-1788 (7th Cir. June 19 and Sept. 18, 1980) (orders denying stay applications). This appeal has been argued and now awaits decision by the Seventh Circuit.

[7]The reorganization court did not reach the question of the priority of the claims of the secured creditors in relation to the "administrative expense" claim accorded the federal loan under Section 110 of the Act and the labor protection claim created by the Act. Thus, this issue is not before the Court.

The original Rock Island Act required that the $75 million prior obligation be imposed on the estate on an extremely short timetable. Section 106(a) provided that the Trustee and rail labor unions were to reach a "voluntary" agreement implementing the Act's labor protection program within ten days from the statute's enactment. In the event that no agreement was reached, the Commission was required under Section 106(b) to "impose" a labor protection arrangement on the estate within thirty days thereafter. Section 106(c) directed the reorganization court to order the Trustee to implement the arrangement devised by the Commission "immediately" upon issuance of the Commission's order. Section 106(d)(1) of the Act provided that no court could stay any Commission or reorganization court order imposing an employee protection scheme under the Act. Section 106(d)(2) of the Act established a truncated appeal procedure which expressly precluded subsequent review by this Court.

On June 5, 1980, in order to prevent implementation of the proposed scheme pursuant to this foreshortened statutory timetable, the Rock Island's Trustee, creditors and shareholders filed a complaint for declaratory relief and moved for a preliminary and permanent injunction against the implementation of the statute's labor protection mechanism. (J.A. 21a-41a.) On June 9, 1980, one day before the statutory procedures of the Act would automatically commence, the reorganization court conducted a hearing on the motion for a preliminary injunction. The hearing consisted of extensive arguments by counsel and the submission of affidavits. At the conclusion of the hearing, Judge McGarr found an "exceedingly great" probability that the Act would work an unconstitutional taking of the property of the Rock Island and deprive the Rock Island estate of due process of law in violation of the Fifth Amendment to the United States Constitution, by its summary imposition of a new $75 million labor protection claim on the liquidating Rock Island estate. (J.A. 152a-156a.) He rejected arguments that the Commission should be allowed to

devise a labor protection arrangement pursuant to the Act because in his view the taking mandated by the Act would be unconstitutional regardless of its amount. (J.A. 155a.) Accordingly, he entered a preliminary injunction enjoining implementation of the original Rock Island Act's labor protection scheme to prevent irreparable injury to the Rock Island estate. RLEA filed a notice of appeal to this Court from that order on June 11, 1980, under 28 U.S.C. § 1252. (J.A. 10a.)

On June 20, 1980, after additional briefing and argument by all parties, Judge McGarr denied the motion of the United States and the Interstate Commerce Commission, joined by RLEA, to vacate his June 9 preliminary injunction. He reiterated his finding that the statute was unconstitutional for "more than one reason", including the fact "that any imposition of labor protection by Congress on the Rock Island payable out of the Estate was an unconstitutional taking." (J.A. 183a-184a.)

On June 28, 1980, Justice Stevens, as Circuit Justice for the Seventh Circuit, denied RLEA's application for a stay of the district court's order and, in a memorandum opinion, indicated his preliminary agreement with the district court's conclusion as to the unconstitutionality of the original Rock Island Act. *RLEA* v. *Gibbons*, *supra*, 448 U.S. at 1305. This Court subsequently sustained Justice Stevens' denial of the stay. 448 U.S. at 909.

Although RLEA had joined in the motion to vacate the district court's June 9 preliminary injunction, RLEA never filed a second notice of appeal following the district court's denial of that motion on June 20, 1980. The Government filed a timely notice of appeal to this Court from the June 20 ruling, but did not docket its appeal. See *supra* at 2-3.

The Staggers Rail Act Of 1980

On September 29, 1980, Congress re-enacted, without substantial alteration, as part of the Staggers Rail Act of 1980, the same scheme to impose a new $75 million labor protection obligation

on the Rock Island estate which had been contained in the original Rock Island Act. *Compare* Sections 106 and 110 as amended by Section 701 of the Staggers Act *with* Sections 106 and 110 of the original Rock Island Act. 45 U.S.C. §§ 1005, 1008. RLEA Br. App. A.

The Staggers Act corrected some of the procedural defects of the original Act[10] and aggravated others.[11] The basic labor protection scheme, however, remained unchanged, as did the requirement that the Rock Island estate fund the statute's employee protection scheme directly, or through a federal loan with "administrative expense" status. Staggers Act, Section 701, amending Sections 106(a)-(c), (e), (f), and 110 of the original Rock Island Act. The Staggers Act added Section 124(c) to the original Rock Island Act; Section 124(c) provides that "nothing in this Act . . . shall limit the right of any person to commence an action in the United States Court of Claims under . . . the Tucker Act."

On October 7, 1980, RLEA and the Government requested Judge McGarr to vacate his order declaring the Act to be unconstitutional. Comparing the original Rock Island Act and the Staggers Act amendments, Judge McGarr observed (J.A. 203a):

> This is not new legislation in my view. This is amended legislation which attempts, but fails, to clear the underlying flaws which caused me to find the bill unconstitutional in the first place. It remains basically the same law with the same defects and is subject to the same injunction.

[10]The Staggers Rail Act eliminated Section 106(d)(1) of the original Act, which precluded any judicial stay of a Commission order imposing labor protection under the Act, and the last sentence of Section 106(d)(2) of the original Act, which purported to preclude review by this Court of an order imposing a labor protection arrangement under the Act.

[11]The period during which the Trustee and labor unions are permitted to "negotiate" an agreement was reduced from ten to five days. Failing a "voluntary" agreement, the time within which the Commission is required to "impose" a labor protection arrangement was reduced from 30 to 15 days.

On October 15, 1980, Judge McGarr issued a written order continuing in effect his June 9 injunction. Judge McGarr specifically found that even if a Tucker Act remedy later became available, the Staggers Act would continue to expose the Rock Island to irreparable injury through the disruption of the ongoing liquidation. (J.A. 207a; see also J.A. 202a-203a.)

The Staggers Act also added extraordinary provisions regarding judicial review. Staggers Act, Section 701(a)(1), adding Section 124 to the Rock Island Act. The Seventh Circuit, in compliance with those provisions, heard the case *en banc* and decided it within the required sixty days after the filing of the notice of appeal. On December 18, 1980, the Seventh Circuit affirmed Judge McGarr's decision by a vote of 3 to 3. *RLEA v. Gibbons*, Nos. 80-2487 and 80-2536 (7th Cir. 1980) (J.A. 210a). RLEA sought stays of Judge McGarr's October 15 order, which were denied by the court of appeals and by this Court. See *supra* at 4. RLEA filed an appeal with this Court, which noted probable jurisdiction of the appeal in No. 80-1239 on April 27, 1981.

SUMMARY OF ARGUMENT

I. Congress' attempted retroactive imposition of a new $75 million burden on the moribund Rock Island estate to benefit former employees whose services are unneeded by any potential acquiring carriers is unconstitutional on its face for several reasons: it effects a taking of the Rock Island's property without adequate compensation and without due process of law; it violates the separation of powers doctrine; it violates the requirement that bankruptcy laws be uniform; and it violates the estate's substantive due process rights. If, however, this Court finds that further factual development is necessary to decide the ultimate constitutionality of the scheme, this Court should still affirm Judge McGarr's preliminary injunction because he did not abuse his discretion in enjoining the implementation of the Rock Island Act's labor protection scheme. To require the estate to fund the

$75 million scheme pending a final adjudication of the constitutionality of the Act is likely to constitute a taking and violate other constitutional rights, all of which would cause irreparable injury to the Rock Island estate, its creditors and shareholders.

II. The Rock Island Act works a taking of the Rock Island's property for a public purpose, which requires that the estate receive just compensation for the property taken. A railroad has a constitutional right to withdraw its assets from public use when the operation can take place only at a loss. *Brooks-Scanlon Co. v. Railroad Commission*, 251 U.S. 396, 399 (1920). The reorganization court having determined that the Rock Island was unreorganizable as an operating railroad in whole or in part, having ordered total liquidation, and having formally confirmed the total abandonment of railroad operations, the Rock Island was constitutionally entitled to withdraw from rail service. It follows that Congress could not require it to incur further obligations, such as the Rock Island Act's labor protection scheme, in the public interest or as a condition of withdrawal from rail operations.

Appellants' argument that the Rock Island Act confers a benefit upon the Rock Island because it is a substitute for labor protection that would otherwise be imposed on the estate is without merit. The statutes they rely upon to show that the Rock Island had a pre-existing labor protection obligation incorporate the prior practice of the Interstate Commerce Commission in determining employee benefits. The unbroken line of Commission authority has been that labor protection is not to be imposed as a condition of total line abandonment. Thus, the Act cannot be viewed as compromising a pre-existing obligation.

If Congress determines that national transportation policy requires that those Rock Island former employees no longer needed to operate former Rock Island lines must be supported, the cost must be borne by the public. The Rock Island cannot constitutionally be required to fund this public purpose.

III. In addition to effecting a taking for which just compensation is required, the labor protection provisions of the Rock Island Act are constitutionally deficient in a number of additional important respects.

First, despite the long pendency of the reorganization proceedings and Congress' awareness that the reorganization court was about to rule on the propriety of imposing labor protection as a condition to total line abandonment, the Rock Island Act directs the reorganization court in a particular case to impose labor protection and to adopt a plan to be devised by the Commission. Consequently, the Rock Island Act is a rare and flagrant instance of legislative direction to a court as to the outcome of a single pending case, and is thus invalid under the constitutional doctrine of separation of powers.

Second, the Rock Island Act violates the uniformity provision of the Bankruptcy Clause of the United States Constitution, art. I, § 8, cl. 4. It is a "law on the subject of bankruptcies" because it affects the relations between a debtor and its creditors. It does not, however, apply to another railroad similarly situated. Another railroad is in liquidation, yet no comparable scheme has been proposed. Indeed, the only somewhat comparable plan was imposed on the Milwaukee Road, a railroad undergoing a successful reorganization, not abandonment and liquidation, and thus not subject to *Brooks-Scanlon, supra*, and its progeny. As a law applicable only to a single bankrupt, which cannot benefit from its provisions, the Rock Island Act cannot pass constitutional muster under the uniformity provision of the Bankruptcy Clause. For similar reasons, the Act also fails to satisfy the equal protection component of the Fifth Amendment Due Process Clause.

Finally, the Act's imposition of a labor protection scheme is retroactive. The Rock Island Act does not relate to costs incurred

during or because of an employment relationship and not previously discharged by the employer. Here, the Rock Island Act's obligation is imposed on the former employer to compensate former employees although they have already been fully compensated for their services. This retroactive aspect of the Rock Island Act renders it a taking of property without due process of law.

IV. The constitutional defects of the Rock Island Act are not cured merely because the estate is not precluded from suing the Government under the Tucker Act in an attempt to recover its money taken to fund the labor protection scheme. The Tucker Act does not provide the Government with a license to undertake actions which will result in violations of important constitutional rights, nor is it a substitute for normal legislative appropriations. Moreover, deferring resolution of these constitutional issues to a later proceeding before the Court of Claims would, in itself, cause irreparable injury to the bankrupt estate, its creditors and shareholders.

ARGUMENT

I.

ONLY JUDGE McGARR'S OCTOBER 15, 1980 ORDER CONTINUING IN EFFECT THE PRELIMINARY INJUNCTION ENJOINING IMPLEMENTATION OF THE ROCK ISLAND ACT'S LABOR PROTECTION SCHEME IS PROPERLY BEFORE THIS COURT FOR REVIEW.

In noting probable jurisdiction over No. 80-1239, this Court stated that it would postpone further consideration of the question of jurisdiction over No. 80-415 until the cases are heard on the merits. The Court directed the parties to address whether the issue of the constitutionality of the employee protection provi-

sions of the Rock Island Act is properly before this Court. Appellees contend that No. 80-415 is not properly before this Court, for the reasons stated *supra* at 2-3. In No. 80-1239, the issue of the facial constitutionality of the employee protection provisions of the Act is properly before this Court, as is the appropriateness of Judge McGarr's determination that the Act should be preliminarily enjoined.

A. This Court Has Jurisdiction To Review Judge McGarr's October 15, 1980 Order.

This Court has jurisdiction over appeal No. 80-1239. Section 1252 of the Judicial Code expressly grants this Court jurisdiction over appeals "from an interlocutory . . . decree or order of any court of the United States . . . holding an Act of Congress unconstitutional," where an officer of the United States is a party. 28 U.S.C. § 1252. In accordance with this statute, this Court has consistently entertained appeals from grants of preliminary injunctions where the lower court's action was predicated on a finding that a Congressional act was unconstitutional and where an officer of the United States was a party. *See, e.g., McLucas v. DeChamplain*, 421 U.S. 21 (1975). The appeal in No. 80-1239 falls squarely within this jurisdictional grant. Judge McGarr based his decision continuing the preliminary injunction in effect on a finding that the Rock Island Act is unconstitutional, and the Secretary of Transportation is a party to this proceeding. Thus, Judge McGarr's order continuing in effect the preliminary injunction and the Seventh Circuit's judgment of affirmance are properly reviewable by this Court in this appeal.

B. Judge McGarr's October 15, 1980 Order Is Ripe For Review.

The Government and RLEA take divergent positions as to which constitutional questions are ripe for this Court's review.

They distinguish as separate issues (i) whether the Rock Island Act constitutes a taking of the bankrupt estate's property (the "taking" issue), and (ii) whether by expressly stating that "[n]othing in [the Rock Island Act] shall limit the right of any person to commence an action in the Court of Claims" under the Tucker Act, the Rock Island Act affords adequate compensation for any taking that might occur (the "Tucker Act" issue).[12]

RLEA urges that the Tucker Act issue be decided now but that the taking issue be deferred to a later Tucker Act hearing in the Court of Claims, thus ensuring that payments are made to its members now, regardless of the ultimate disposition of the taking issue. Thus, RLEA's position in effect is that the constitutionality of the Act is irrelevant so long as its members are immediately paid the Act's benefits. RLEA Br. 21-29. The Government, by contrast, advocates that this Court reach the taking issue first, so that if the Act is found to constitute a taking, Congress will have the opportunity to repeal the legislation before any moneys are paid out for which the Government would later have to make reimbursement. Govt. Br. 17-20.

RLEA bases its position that the taking issue is not ripe for review on the ground that the extent of the taking cannot be known until (i) the Commission is allowed to prescribe the terms of the labor protection arrangement, and (ii) factual inquiries (*e.g.*, "the true costs of the program in relation to the entire estate's worth") are completed. RLEA Br. 25-28. The Government argues that the taking issue is ripe for review on the grounds that (i) determination of the taking issue does not require any further factual inquiry, and (ii) in any event, Judge McGarr's orders respecting the issuance and continuance of the preliminary injunction were "in effect permanent injunctions", which can therefore be reviewed with finality. Govt. Br. 15.

[12]Appellants do not address whether the due process, separation of powers, and uniform laws on bankruptcy issues are ripe for review.

The correct position is discerned by examining the procedural posture of this case. The function of a preliminary injunction is "to preserve the relative positions of the parties until a trial on the merits can be held." *University of Texas v. Camenisch*, 101 S.Ct. 1830, 1833 (1981). As this Court explained in *Camenisch*,

> Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary injunction hearing. . . .

Judge McGarr's orders entering and then continuing a preliminary injunction in effect cannot be treated as a permanent injunction, as the Government suggests. Judge McGarr expressly stated at the conclusion of the hearing on the preliminary injunction that he was issuing a "preliminary injunction" and that he would determine later "whether, after I hear whatever additional you have to present, it should be transmuted into a permanent injunction, a final injunctive order. . . ." (J.A. 157a; see also J.A. 179a-180a, 205a-209a.)

At no point in the proceedings did appellants request that the trial on the merits be advanced and consolidated with the hearing on the application for a preliminary injunction or the subsequent hearings on the motions to vacate the preliminary injunction, a procedure expressly made available by Rule 65(a)(2), Fed. R. Civ. P. To seek at a later date to treat the preliminary injunction hearing as the trial on the merits, as the Government now urges, violates the rule that there should be clear and unambiguous advance notice to all the parties of the court's intention to consolidate the trial on the merits and the preliminary injunction hearing so that the parties can have a full opportunity to present

their cases on the merits. *University of Texas v. Camenisch, supra*, 101 S.Ct. at 1834.

For whatever reasons, RLEA and the Government chose not to request the consolidation of the preliminary injunction hearing and the trial on the merits. Instead, on the eve of the enactment of the Staggers Act, they moved to vacate the preliminary injunction, and they then chose to appeal an order continuing the preliminary injunction in effect. They could have pressed for a hearing on the merits, presented additional evidence and then waited to appeal the permanent injunction, if granted. They did not do so.[13] Thus, what is before the Court for review is Judge McGarr's order continuing in effect a preliminary, not a permanent, injunction. Consequently, the proper standard for this Court's review, to the extent that factual determinations remain, is whether Judge McGarr committed an abuse of his discretion in continuing in effect a preliminary injunction enjoining implementation of the Rock Island Act. *Bath Industries, Inc. v. Blot*, 427 F.2d 97, 111 (7th Cir. 1970); *Beneficial Finance Co. v. Wirtz*, 346 F.2d 340, 344 (7th Cir. 1965).

RLEA is misguided when it suggests that the detailed inquiry into the taking issue not made by Judge McGarr at the hearings on the preliminary injunction can now be made only in a later proceeding under the Tucker Act.[14] RLEA Br. 26. Given the limited time available to him because of the extremely compressed timetable mandated by the original Rock Island Act and the Staggers Act (see J.A. 204a), Judge McGarr did all he was

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[13]As of the filing of this brief, neither appellant has requested that the reorganization court hold a trial on the merits.

[14]RLEA couples the suggestion that Judge McGarr made an inadequate factual inquiry with the argument that the complete factual inquiry can be deferred to a later hearing before the Court of Claims under the Tucker Act. The latter argument is addressed *infra* at 60-66.

able to do: he heard the arguments of the parties, he considered the limited evidence offered to him by way of affidavit, and then based upon this and upon his five years' experience presiding over these proceedings, he decided the issue. To suggest that Judge McGarr is now barred from making a detailed factual inquiry as to the existence of a taking, should a trial on the merits be required, is to treat an expedited hearing on an application for a preliminary injunction as a full-dress trial on the merits.

To the extent that the taking, the Tucker Act, the due process, the separation of powers and the uniform laws on bankruptcy issues present purely legal questions as to the constitutionality of the Rock Island Act, those issues can be fully determined by this Court at this time and they should be decided now. *Regional Rail Reorganization Act Cases* ("*3R Act Cases*"), 419 U.S. 102, 149 n.36 (1974). To the extent that the constitutionality of the Act cannot be resolved on its face and the resolution of these issues is dependent upon the determination of factual questions, the issue for review at this time is whether the court below abused its discretion in issuing a preliminary injunction pending a final trial on the merits.

The Act is unconstitutional on its face in that it commits a taking without adequate compensation, and in that it violates appellees' due process rights, the separation of powers doctrine and the mandate that bankruptcy laws be uniform. In the alternative, appellees contend that Judge McGarr did not abuse his discretion in finding a likelihood that the Act works an unconstitutional taking without adequate compensation as it applied to the Rock Island estate, that it was unconstitutional for other reasons as well, and that the preliminary injunction should remain in effect until there has been a trial on the merits before Judge McGarr because of the irreparable injury that would otherwise accrue to the estate.

II.

BY REQUIRING THE ROCK ISLAND ESTATE TO EXPEND ITS PRIVATE FUNDS FOR A PUBLIC PURPOSE THE EMPLOYEE PROTECTION PROVISIONS OF THE ROCK ISLAND ACT CONSTITUTE A TAKING UNDER THE FIFTH AMENDMENT FOR WHICH COMPENSATION IS REQUIRED.

A. Having Sustained Losses Of Over $200,000,000 During Reorganization, The Rock Island Estate Is Not Required To Expend Further Funds In The Public Interest.

The Rock Island filed its petition for reorganization under Section 77 of the Bankruptcy Act of 1898 on March 17, 1975. At year-end 1975, the Trustee reported total assets of $441,126,044. During the reorganization years from 1975 through 1980, the Rock Island estate suffered net losses totalling $210,627,230. See *supra* at 5. These losses accelerated as the reorganization progressed. In a single year, 1979, during which the strike occurred, the Rock Island lost $93,860,096. See *supra* at 5 n. 5. Thereafter, the Rock Island was declared cashless by the Commission, all of its rail operations ceased, and the Commission appointed a directed rail carrier to provide service over its lines. See *supra* at 7-8.

Against this background, on January 25, 1980, Judge McGarr concluded that the Rock Island could not be reorganized on an income basis as an operating railroad and ordered its liquidation. On June 2, 1980, he formally confirmed the abandonment of all of its lines and the total cessation of all rail operations. See *supra* at 8-11.

Judge McGarr's rulings followed the "basic principle that an owner of property retains the right ultimately to withdraw that property from a losing venture. Indeed, such a right appears to be

a fundament of the taking provision." *In re Central Railroad of New Jersey*, 485 F.2d 208, 213 (3d Cir. 1973), *cert. denied*, 414 U.S. 1131 (1974) (footnotes omitted). While railroads in reorganization can continue to be subject to governmental regulation to serve national transportation policy for reasonable periods pending efforts to achieve an income-based reorganization, governmental regulation of private property, including property owned by railroads, is limited by the Fifth Amendment. *3R Act Cases*, *supra*, 419 U.S. at 122-24.

At some point, railroad industry investors are entitled to withdraw their assets, or what remains of them, totally from public use. This limitation on permissible governmental impositions on railroad investors was originally established in the case of *Brooks-Scanlon Co. v. Railroad Commission*, *supra*, 251 U.S. at 399-400, which the Government concedes retains its vitality. Govt. Br. 27. In *Brooks-Scanlon*, this Court, speaking through Justice Holmes, struck down a state railroad commission order requiring a railroad to maintain rail operations when service could continue only through additional losses, reasoning that:

> If the plaintiff be taken to have granted to the public an interest in the use of the railroad it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss.

251 U.S. at 399. *Accord*, *Railroad Commission v. Eastern Texas Railroad*, 264 U.S. 79, 85 (1924); *Bullock v. Railroad Commission*, 254 U.S. 513, 520-21 (1921).

All parties agree that there is a point at which the *Brooks-Scanlon* principle absolves a railroad from expending its funds or consuming its assets in the public interest. RLEA Br. 40-41, Govt. Br. 26-27. RLEA and the Government refuse, however, to recognize that that point was reached either on January 25, 1980, when the Rock Island was found unreorganizable as an operating

railroad and ordered to liquidate, or on June 2, 1980, when the reorganization court confirmed the total abandonment of the railroad's lines and services.[15]

Only in instances where there remains some hope of an income-based reorganization can a bankrupt railroad be compelled to endure further losses. In *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Railroad*, 294 U.S. 648 (1935), for example, this Court upheld an injunction which deferred the right of secured creditors to foreclose on collateral, where the sale would have impaired the ability of the court to achieve a successful reorganization under Section 77 of the Bankruptcy Act. This deferral was justified while there remained the prospect of a successful reorganization in that case and because the rights of the creditors to reclaim their investments would be preserved and even enhanced thereby. 294 U.S. at 676-77. Similarly, earlier in the Rock Island's current reorganization proceedings, the Seventh Circuit Court of Appeals upheld a priority borrowing by the Trustee to enhance the prospect of an income-based reorganization of the Rock Island, even though that borrowing would for a time displace the interests of the estate's creditors. It permitted the borrowing on the theory that it might foster the ultimate possibility of a successful income-based reorganization, in which the creditors would receive satisfaction of their claims. *In re Chicago, Rock Island & Pacific Railroad*, 545 F.2d 1087, 1090-91 (7th Cir. 1976). *See also New Haven Inclusion Cases*, 399 U.S. 392, 466 (1970), *quoting with approval and aff'g in relevant part, In re New York, New Haven & Hartford*

[15]The court of appeals has fixed January 25, 1980 (the date of the liquidation order) as the date on which the continued operation of the Rock Island no longer served the public interest, *In re Chicago, R.I. & P.R.R.*, No. 80-1353, *supra* at J.A. 392a, and June 2, 1980 (the date of formal confirmation of abandonment) as the date on which the Rock Island no longer had any obligations to operate under the Interstate Commerce Act, *Gibbons v. United States*, Nos. 80-1786 and 80-1858, slip op. at 8 (7th Cir. Aug. 26, 1981).

Railroad, 304 F.Supp. 793, 801 (D. Conn. 1969); *In re Chicago, Milwaukee, St. Paul & Pacific Railroad*, 611 F.2d 662, 669 (7th Cir. 1979); *In re Penn Central Transportation Co.*, 384 F.Supp. 895, 918-19 (Special Ct. 1974), *aff'd in relevant part sub nom. Regional Rail Reorganization Act Cases*, *supra*, 419 U.S. at 122-25; *In re Penn Central Transportation Co.*, 382 F.Supp. 856, 868 (E.D. Pa. 1974). These decisions all recognize the *Brooks-Scanlon* principle.

Here, after five years of efforts to achieve an income-based reorganization and the consequent massive erosion of the estate, the Commission, the Federal Railroad Administration, the reorganization court and the United States Court of Appeals for the Seventh Circuit have agreed that there is no possibility that the Rock Island can be reorganized on an income basis as an ongoing railroad. See *supra* at 8-9. The reorganization court has determined that in view of the impossibility of reorganization on an income basis, the Rock Island is entitled to withdraw from the universe of industries subject to public regulation. *Brooks-Scanlon* and its progeny establish that the limited period during which Rock Island investors can be assumed to have agreed to commit the estate's resources to the public's transportation needs is long past. As this Court recognized in *Brooks-Scanlon*, in the absence of any remaining common carrier obligations, a railroad cannot be required to expend funds or continue to incur losses to further national transportation policy. Investors cannot be compelled to expend "money to maintain a railroad for the benefit of others who do not care to pay for it." 251 U.S. at 399.

If, as the appellants argue and Congress apparently determined (see *infra* at 41), national transportation policy requires "protection" of the Rock Island's former employees, then to require the Rock Island to pay for that protection is to require, indirectly, the unreorganizable and moribund Rock Island to continue to advance national transportation policy at a cost to the Rock Island

of up to $75 million. The Rock Island is not now, nor will it ever again be, an operating railroad. In this circumstance, the national transportation policy cannot override the constitutional rights of the Rock Island investors. For the same reason Congress cannot direct the Rock Island to resume rail operations, it cannot impose other public carrier obligations, such as a new labor protection scheme, on this defunct railroad. As in the case of the New Haven Railroad, "[t]he public interest has had one huge bite of the apple; it is not entitled to another." *In re New York, New Haven & Hartford Railroad, supra*, 304 F.Supp. at 801.

Whatever the public purpose stated in the Rock Island Act, the settled constitutional principle set forth in *Brooks-Scanlon* mandates that the Rock Island estate can no longer be required to bear further losses in order to advance national transportation policy. Thus, Judge McGarr properly determined that the Act is facially unconstitutional. In the alternative, should this Court conclude that the constitutionality of the Act cannot be resolved on its face, Judge McGarr did not abuse his discretion in finding an "exceedingly great" likelihood (J.A. 156a) that the Rock Island Act violates the constitutional principles set forth in *Brooks-Scanlon* and its progeny.

B. The Rock Island Estate Had No Pre-Existing Labor Protection Obligations.

The Government and RLEA attempt to justify the labor protection scheme of the Rock Island Act on the ground that the estate benefits from the employee protection provisions of the Act. Govt. Br. 35, RLEA Br. 41. Appellants premise their argument on the theory that the Act merely recodifies or limits pre-existing labor protection obligations of the estate. The Government and RLEA are mistaken. The reorganization court properly decided that the Rock Island had no pre-existing labor protection obliga-

tions. As Judge McGarr stated when he formally confirmed the abandonment of Rock Island rail operations, the determination that the Rock Island had no pre-existing labor protection obligations was constitutionally compelled by the *Brooks-Scanlon* line of cases and is consistent with an unbroken line of I.C.C. determinations. (J.A. 270a-271a.)

This line of Commission authority has remained unchanged despite numerous changes and recodification of the governing statute. Under Section 1a(1) of the Interstate Commerce Act, now recodified as 49 U.S.C. § 10903 (Supp. III 1979), prior to enactment of the Milwaukee Road Restructuring Act, 45 U.S.C. §§ 901-922 ("Milwaukee Act"), railroads were required to obtain certificates from the Interstate Commerce Commission in order to withdraw rail lines from service based upon a public convenience and necessity standard. In addition, it was for the Commission to decide what labor protection, if any, should be imposed as a condition to abandonment.

In 1979, Congress enacted a different procedure for abandonments of railroads in reorganization under Section 77 of the Bankruptcy Act of 1898, as amended. Section 17(a) of the Milwaukee Act, 45 U.S.C. § 915(a), transferred the jurisdiction to authorize abandonments of rail lines from the Commission to the reorganization court. It also transferred to the reorganization court jurisdiction to consider labor protection issues which arose in connection with such abandonments. Although Congress transferred jurisdiction to decide such questions from the Commission to the reorganization court, it specifically directed the court to look to the law of labor protection that had evolved under the Commission's decisions as the precedent the reorganization court must apply. The legislative history of Section 17(a) of the Milwaukee Act establishes that this transfer of jurisdiction from the Commission to the court was intended to make "no change in existing law as it affects employee protection." H.R. CONF. REP.

No. 96-583, 96th Cong., 1st Sess. 27, *reprinted in* [1979] U.S. Code Cong. & Ad. News 1747, 1759.[16]

Prior to the enactment of Section 17(a), Commission approval of abandonments of railroad lines was governed by 49 U.S.C. § 10903. Like Section 17(a), Section 10903 adopted the law of labor protection that had evolved under Section 11347 of the Interstate Commerce Act. 49 U.S.C. § 11347. Under Section 10903, when a railroad requested a certificate of abandonment in connection with the abandonment of a portion of the railroad, employee protection conditions were imposed. *See Oregon Short Line Railroad—Abandonment—Goshen*, 360 I.C.C. 666, 667 (1980). Congress specifically recognized, however, when it reenacted Section 10903, that systemwide abandonments are subject to a different set of rules. The legislative history of Section 10903 makes the point plainly, referring to

> [e]mployee protection no less beneficial than that established under Section 5(2)(f) of the Interstate Commerce Act and Section 405 of the Rail Passenger Service Act *but without intention to change the policy and practice of the Commission in connection with certificates involving total termination of service by a railroad company*. . . .

[16]Section 17(a) provides:

> "[I]n authorizing any abandonment pursuant to this section, the court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under Section 11347 of Title 49 [of the United States Code]."

45 U.S.C. § 915(a).

Section 11347 is the recodification of Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(f), which applies only to labor protection to be accorded in consolidation, mergers and acquisitions. Section 11347 provides that the I.C.C. shall require a

> "carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by [consolidation, merger or acquisition] as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45."

49 U.S.C. § 11347.

S. CONF. REP. NO. 94-595, 94th Cong., 2d Sess. 218, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 148, 233 (emphasis supplied).

The Commission's practice with respect to this discrete area of total line abandonments has remained consistent; it has refused to impose labor protection conditions on entire line abandonments. As the Commission pointed out in its advisory report of May 23, 1980 to the reorganization court, "[i]n past instances where entire rail systems have been abandoned and no company would reap the benefits of the abandonment, we have found the imposition of employee protective conditions not to be warranted." *Chicago, Rock Island & Pacific Railroad—Abandonment, supra*, 363 I.C.C. at 161. *Accord, Montpelier & Barre Railroad—Abandonment*, Dkt. No. AB-202F—(I.C.C. Feb. 6, 1980); *Northampton & Bath Railroad—Abandonment*, 354 I.C.C. 784, 785-86 (1978); *Wellsville, Addison & Galeton Railroad—Abandonment*, 354 I.C.C. 744, 746 (1978); *Tennessee Central Railway—Abandonment*, 333 I.C.C. 443, 453-54 (1968); *East Carolina Railway—Abandonment*, 324 I.C.C. 506 (1964); *Okmulgee Northern Railway—Abandonment*, 320 I.C.C. 637, 645-46 (1964); *Rutland Railway—Abandonment*, 317 I.C.C. 393, 408 (1962), *aff'd sub nom. Brotherhood of Locomotive Engineers v. United States*, 217 F.Supp. 98 (N.D. Ohio 1963). *See also, In re New York, Susquehanna & Western Railroad Company*, 504 F.Supp. 851, 854-56 (D. N.J. 1980).[17]

[17]The Commission has recognized only two narrowly drawn exceptions to this rule, both of which are based upon a financial benefit conferred upon a surviving corporate parent by the abandonment. Labor conditions have been imposed in total line abandonments where the corporate parent of the abandoning rail carrier intends to assume all or some portion of the subsidiary's rail operations while relieving itself of the subsidiary's deficit operation. Labor protection conditions also have been imposed where the corporate parent of the abandoning carrier obtained financial benefit from the disposition of the abandoned properties which was greatly in excess of the parent's net investment in the subsidiary and aggregate losses. The cases listed by the Government as examples of the imposition of labor protection in total line abandonment situations all involved such benefits to surviving corporate parents. See Govt. Br. 30, n.17. These exceptions do not apply here.

In *Northampton & Bath Railroad—Abandonment, supra*, 354 I.C.C. at 785-86, the Commission justified its refusal to impose labor protection conditions on a total abandonment:

> After the entire line of a railroad is abandoned, no operating carrier remains to enjoy the benefits of the abandonment or pay the costs of employee protection. The Commission has generally refused to impose employee protective conditions which would in effect, require continued operation for the benefit of employees or further consumption of a failed railroad's properties for payment of employees' benefits after operations cease.

The Rock Island situation is singularly parallel to that of the Tennessee Central Railway. Like the Rock Island, the Tennessee Central had suffered years of consecutive losses, had consumed its stockholders' equity to offset those operating losses and had no hope of survival as a going concern. Given this history, the Commission concluded that it was "neither equitable nor warranted on any ground to require further consumption of the railroad properties for the payment of employees after the railroad ceases operations." 333 I.C.C. at 454.[18]

[18]The Commission stated (333 I.C.C. at 453-54):

"The applicant is a bankrupt business entity unable to meet either its long-term or immediate financial obligations. Despite its straitened financial circumstances through the years, TC has provided regular employment for its work force and has paid its employees in full satisfaction of the terms of their collective bargaining agreements. On the other hand, it has for many years been unable to provide a return of any kind to its stockholders and has fallen substantially short of meeting its legal obligations to others upon whom it has drawn for supplies, materials and equipment needed to sustain its operation. . . . To the extent it has paid the payroll and other current operating expenses while neglecting other obligations due, the railroad and its employees have been sustained by the creditors. Over the past 5 profitless years, the aggregate deficit has come to nearly $5 million, the stockholder's equity has been consumed in maintaining operations, assets are being further eroded, and the TC has reached the point where it cannot hope, as a going

(Footnote continued on following page.)

The Commission's consistent refusal to impose labor protection in total line abandonments—in the context of a railroad entitled to liquidate—is consistent with the right of investors to withdraw their property from public transportation service under the circumstances described in the *Brooks-Scanlon* line of cases, *supra* at 25-27. As this Court held in *Brooks-Scanlon*, *supra*, 251 U.S. at 400, no regulatory agency can "give the Court or Commission power to do what the Constitution of the United States forbids...." *See also Bullock v. Railroad Commission*, *supra*, 254 U.S. at 520-21.

The Commission has not expressly adverted to this constitutional limitation on its jurisdiction in refusing to impose labor protection conditions in cases of total line abandonments.[19] How-

(Footnote continued from preceding page.)

concern, to pay off its creditors. In such a situation, we find it neither equitable nor warranted on any ground, to require continued operation for the purpose of providing jobs for the carrier's employees or to require further consumption of the railroad properties for the payment of employees after the railroad ceases operation. In reaching this conclusion we are mindful of the fact that certain unemployment compensation is otherwise available to employees. Unlike the circumstances in *Washington and Old Dominion R. Abandonment—Virginia*, 331 I.C.C. 587, or *East Carolina Ry.—Abandonment*, 324 I.C.C. 506, TC is not affiliated with a large, financially strong corporation benefiting from the abandonment and capable of sharing some of the costs incident to an abandonment. The facts of this case do not warrant the imposition of labor protective conditions, and they will not be imposed."

[19]The Government argues that the distinction the Commission has drawn between total and partial line abandonments "has been solely as an exercise of its administrative discretion." Govt. Br. 29. It is conceivable, of course, that a financially healthy railroad may decide to withdraw totally from all rail operations. In that circumstance, it may be that the Commission properly enjoys the discretion to condition approval of that abandonment upon the payment of labor protection based upon the profits which may be derived from the abandonment. But that is not the case here. Here, there is only a railroad which is constitutionally entitled to withdraw from rail service under the *Brooks-Scanlon* line of cases. In that circumstance, there is no discretion in the matter for the reasons stated *supra* at 24-28.

ever, its reasoning based upon the public interest and fairness to a railroad's owners directly parallels the reasoning of *Brooks-Scanlon* and the cases following it. For example, in *Wellsville, Addison & Galeton Railroad—Abandonment, supra*, 354 I.C.C. at 746, the Commission stated:

> Prior Commission precedent in this area is well established. Employee protective conditions have not been imposed in cases involving complete abandonment of operations, because the Commission found it unwarranted to require further consumption of a railroad's properties for the payment of employees after the railroad ceases operations. *Okmulgee Northern Ry. Co.—Abandonment*, 320 I.C.C. 637 (1964). *Tennessee Central Ry. Co.—Abandonment*, 333 I.C.C. 443, 454 (1968).

Thus, the Commission has recognized that there is no justification for imposing labor protection conditions on total line abandonments. Accordingly, as the reorganization court recognized in its ruling of June 9, 1980, the new employee benefits imposed by the Rock Island Act, long after employment and railroad operations had ceased, are not a substitute for pre-existing employee benefits, because none existed. Rather, as Judge McGarr found, the Rock Island Act employee protection obligations are wholly new obligations imposed retroactively on the bankrupt estate, to the inevitable detriment of the estate, its creditors and shareholders.

C. The Rock Island Act Effects A Taking Of The Estate's Private Property For A Public Purpose.

Any taking of private property for a public purpose requires the payment of just compensation under the Fifth Amendment. RLEA and the Government argue that the Rock Island Act's employee protection scheme was permissible regulation which furthered the national transportation policy and consequently that both the scheme and the means chosen by Congress to

carry it out (funding from the assets of a bankrupt estate) are unassailable under the Due Process and Governmental Takings clauses of the Fifth Amendment. RLEA Br. 35-42; Govt. Br. 22-38. Contrary to their assertions, the public purpose of the Act's employee protection scheme does not insulate the Act from constitutional scrutiny; rather, it brings the Act within the prohibition of those clauses.

This Court stated the central purpose of the Takings Clause in *Armstrong v. United States*, 364 U.S. 40, 49 (1960):

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

This Court, speaking through Justice Brandeis, in *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 602 (1935), found that not even the extreme exigencies of the Depression would justify the use without compensation of the property rights of a creditor for the benefit of a debtor merely because financial assistance to the debtor was found to be in the public interest:

> [T]he Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded the public interest may be borne by the public.

The implications of the Fifth Amendment rule in the context of governmental regulation were set forth in the classic case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), where the Court, through Justice Holmes, stated:

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that

> it shall not be taken for such use without compensation. . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
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> * * *
>
> [W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle. . . . In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

260 U.S. at 415-16 (citations omitted).

While disavowing any "set formula" to determine when regulation becomes a taking for which compensation is required under the Fifth Amendment, *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 101 S.Ct. 2352, 2370 (1981); *Andrus v. Allard*, 444 U.S. 51, 65 (1979); *Kaiser Aetna v. United States*, 444 U.S. 164, 174-75 (1979), this Court has laid down guidelines to determine when regulation becomes a taking. Those criteria include "the economic impact of the regulation on the claimant", "the character of the governmental action", and "the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978); *see Kaiser Aetna v. United States, supra*, 444 U.S. at 175. See Govt. Br. 20-22. Moreover, as this Court recently directed: "these 'ad hoc, factual inquiries'

must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances." *Hodel v. Virginia Surface Mining & Reclamation Co., supra*, 101 S.Ct. at 2370. If, however, there is a facial challenge to a statute, the test is "fairly straightforward": the statute "effects a taking if it 'denies an owner economically viable use of his [property].' " 101 S.Ct. at 2370, *citing Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

Measured against these criteria, Judge McGarr correctly concluded that the Rock Island Act's employee protection scheme will effect a taking:

1. The Economic Impact on Claimant. The economic impact of the regulation on the claimant is severe. If the statute's employee protection scheme is funded directly from the Rock Island's assets under Section 106, the estate's money will be paid directly to the former employees. If payments to former employees are funded through an enforced federal loan under Section 110, that loan must be accorded "administrative expense" status. Under either method of funding, the labor protection obligations will have priority over the interests of the estate's shareholders and unsecured creditors, and may have priority over the sums owed to secured creditors and trade creditors with cost of administration status.[20] As Judge McGarr expressly found, for an estate with limited assets of uncertain value and massive liabilities (J.A. 328a-329a), the priority cost of up to $75 million mandated by the Act represents a "significant percentage of the [estate's] total assets." (J.A. 207a.) Without question, the Act's em-

[20]RLEA, while not challenging the standing of the estate in these proceedings, questions the standing of the creditors and shareholders to raise issues of facial unconstitutionality. RLEA Br. 27 n.13. Surely the imposition of a $75 million obligation on the Rock Island estate that will displace the interests of the unsecured creditors and shareholders and may displace the interests of the secured creditors is sufficient to confer standing not only upon the estate but also upon the creditors and shareholders.

ployee protection scheme would dilute the value of the estate and reduce the amount available to discharge its existing debts by an amount of up to $75 million.

This is not, as the Government argues, Govt. Br. 21, an instance of the destruction of one "strand" of a " 'bundle' of property rights". In those cases cited by appellants for that proposition, the Court did not examine what other property a person may have had in order to determine whether the invasion of one particular piece of property constituted a taking. Rather, this Court has looked to the degree of the invasion of the particular property in dispute to determine whether substantial value remained in that particular property despite the intrusion of the regulation or the limitation of the purposes for which that property may be used. In those cases cited by appellants, where this Court has looked to the degree of the invasion to find that no taking has occurred, some property value has remained intact despite the intrusion of the regulation or the limitation of the purposes for which property may be used. *See, e.g., Andrus v. Allard, supra,* 444 U.S. at 65-66; *Penn Central v. City of New York, supra,* 438 U.S. at 104, 130-31. Here, it is not relevant what other property the estate may have. The money spent to fund the Rock Island Act's labor protection scheme will be completely lost to the estate once it is paid out. This is the only property which the Court may consider in weighing the degree of the invasion, and obviously once the money is gone, it is of no value to the estate. *See Kaiser Aetna, supra,* 444 U.S. at 179-80. In any event, as set forth *infra* at 39, 63, the statute will withdraw from the estate a significant portion of its total assets.

RLEA argues that the estate is "not in reality, seeking to prevent any monies from being taken initially from the estate, but rather, is objecting to the estate's being required to borrow funds to comply with the statute", and that the labor protection provisions will "not deplete the cash reserves of the estate." RLEA Br.

27, 29. This mischaracterizes the obvious impact of the statute. Although the Act gives the estate the option of borrowing money from the Government to pay the Act's labor protection benefits immediately, the money is not a gift. Indeed, because it enjoys "administrative expense" status, it must be repaid ahead of the claims of the unsecured creditors and shareholders. The Trustee's Statement of Assets and Liabilities for year-end 1980 shows that the estate's liabilities exceed the net book value of its assets by $25 million. (J.A. 328a-329a.) Thus, while the imposition of a $75 million loan may not deplete the present cash position of the estate, the bankrupt estate will still ultimately be required to repay the loan.

2. *The Character of the Governmental Action.* The Rock Island Act is also deficient when measured against the second criterion of *Penn Central Transportation Co. v. City of New York*, *supra*, 438 U.S. at 124, the character of the governmental action. A taking is more readily found when there is a direct governmental interference with property rights. *Id.* Where the property taken is money, it is unnecessary to look for a "physical invasion" of property as a prerequisite for finding a taking within the meaning of the Fifth Amendment, as the Government suggests. Govt. Br. 21. Although there is no land for the Government to invade, the forced taking of $75 million from the monetary assets of this bankrupt estate is a sufficient "invasion" to invoke the protections of the Fifth Amendment. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).

That the Act requires the estate to pay the money to the former employees rather than to the Government does not make the scheme any less a taking. *See, e.g., 3R Act Cases*, *supra*, 419 U.S. at 152, 155 (statutorily mandated conveyance of Penn Central properties to Conrail, a private corporation, held a taking).

3. *Interference with Investment-Backed Expectations.* Application of the third criterion of the *Penn Central* case, the extent to which the regulation has interfered with distinct investment-

backed expectations, 438 U.S. at 124, fortifies the conclusion that the Rock Island Act's labor protection provisions constitute a taking for which just compensation is required. Both the Government and RLEA argue that the Act is consistent with the appellees' investment-backed expectations because the Act merely modifies a pre-existing obligation. Govt. Br. 34-37, RLEA Br. 36-40. As explained *supra* at 24-34, under the *Brooks-Scanlon* precedent and an unbroken line of I.C.C. cases, appellees had every reason to expect that no labor protection would be imposed if circumstances required the Rock Island to withdraw totally from rail services because it was unreorganizable as an income-producing railroad. The appellees certainly did not expect that once the system-wide abandonment of the railroad was ordered, a tremendous new burden would be imposed as a condition of the withdrawal from rail services. The two principal cases upon which appellants rely (RLEA Br. 36-38, Govt. Br. 34-35), *United States v. Lowden*, 308 U.S. 225 (1939); *I.C.C. v. RLEA*, 315 U.S. 373 (1942), in no way suggest the contrary, because neither case requires payments to former employees by a railroad having a constitutional right to abandon all rail operations. Neither case purported to overrule or limit *Brooks-Scanlon* or its progeny. Rather, both cases address labor protection obligations of railroads with ongoing railroad operations. Moreover, no investor or creditor could have anticipated that if a new labor protection obligation could be imposed, it would enjoy "administrative expense" status, to the possible detriment of secured creditors and to the certain detriment of shareholders and unsecured creditors. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

The justification for imposing regulatory burdens upon a going concern, *viz.*, that the economic cost of regulation is the price a company must pay for the privilege of engaging in a business that operates in interstate commerce, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-20 (1976), is inapplicable here. Once a com-

pany engaged in a regulated activity has permanently lost its ability to produce income, it has lost the ability to realize any benefit from the regulated activity that would balance the economic burden of the regulation. At that point, newly imposed regulation ceases to be a mere adjustment of benefits and burdens because all possible benefits have disappeared, and the burden of the regulation becomes a pure taking.

The Government argues that the employee protection provisions of the Act are justifiable regulation because they ultimately benefit the Rock Island by limiting a potential obligation of the estate and providing a means for funding it. Govt. Br. 35. As was demonstrated *supra* at 28-34, there is no potential labor protection obligation of the estate. Moreover, Congress, in the recitals in the preamble to the Act, did not profess to be benefiting the Rock Island in any manner.[21] On the contrary, the preamble recognizes that the Rock Island was in liquidation and had withdrawn from rail operations. Thus, the preamble emphasizes the importance to the public interest of maintaining rail service in the Midwest and the role of employee protection in maintaining that rail service—a public interest goal which the Rock Island estate can no longer constitutionally be compelled to serve.

[21]The preamble reads as follows:

"Sec. 102. (a) Congress hereby finds that—

"(1) uninterrupted continuation of services over Rock Island lines is dependent on adequate employee protection provisions covering Rock Island Railroad employees who are not hired by other railroads;

"(2) for those Rock Island Railroad employees not hired by other rail carriers, there is no other practicable means of obtaining funds to meet the necessary costs of such employee protection that are assumed by the Rock Island Railroad;

"(3) a cessation of necessary operations of the Rock Island Railroad would have serious repercussions on the economies of the States in which such railroad principally operates; and

"(4) premature cessation of services over lines which are the subject of pending purchase application would result in harm to the shipping public and could imperil continuation of commuter service."

The Government, citing the Conference Report on the Staggers Act, H.R. CONF. REP. NO. 96-1430, 96th Cong., 2d Sess. 138, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 4110, 4170, identifies several other respects in which the Rock Island allegedly benefited from the Act. Govt. Br. 35 and n.22. First, the Government argues that the Act assisted an orderly liquidation process by making funds available for the payment of labor protection obligations. But, as has been shown *supra* at 28-34, the Rock Island had no pre-existing labor obligations and therefore did not require any funding for this purpose. Moreover, the funding to which the Government refers is a loan with "administrative expense" status. The imposition of a new loan which must be repaid in advance of other unsecured creditors and shareholders hardly advances the liquidation process or benefits the Rock Island.

The Government also refers to the fact that the Act expedited "agency consideration." Govt. Br. 35. Neither the Government nor the Conference Report on which it relies explains precisely in what respect the Rock Island was benefited by expedited "agency consideration" of its matters, especially since, by the time the Staggers Act was enacted, the Rock Island's total abandonment of rail operations had been formally confirmed.

The Conference Report to the Staggers Act cited by the Government (Govt. Br. 35 n.22) also states that the Rock Island estate "has benefitted from the Rock Island Transition Act . . . through the Congressionally-supported March 4, 1980, agreement. . . ." H.R. CONF. REP. NO. 96-1430, 96th Cong., 2d Sess. 138 (1980). Under an agreement between labor unions and operating carriers entered into on March 4, 1980, the employees who were needed to operate those parts of the Rock Island lines that would continue in rail service to be conducted by other carriers were already being given preference for hiring and other protections. Labor Protective Agreement Between Railroads Parties Hereto Involved in Midwest Rail Restructuring and Employees

of Such Railroads Represented by the Rail Labor Organizations Operating Through the Railway Labor Executives' Association ("March 4 agreement"), *reprinted in St. Louis Southwestern Railway—Temporary Authority—Chicago, Rock Island & Pacific Railroad, supra*, 360 I.C.C. at 744-51. The record before the reorganization court on the preliminary injunction hearing, and therefore the record before this Court in these appeals, is completely devoid of any evidence of a relationship between the Staggers Act and the March 4 agreement signed months before or of any benefit to the Rock Island estate therefrom. No hearings were conducted by any Congressional committee in connection with that portion of the Staggers Act dealing with the Rock Island.[22] Thus there is no basis whatsoever for the Government's assertion of a relationship between the March 4 agreement and the Staggers Act or any private benefit to the Rock Island estate.

Moreover, the program enacted by Congress did not even advance the public interest objectives of maintaining Midwest rail service expressly cited by Congress in the preamble to the Act. Former Rock Island employees who are employed by carriers acquiring parts of the Rock Island lines will not require, and cannot benefit from, the labor protection program prescribed in the Rock Island Act. The only employees to be "protected" by the Rock Island Act are those former employees whose services will not be required by acquiring carriers. To compel the estate to pay them

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[22] Moreover, when the portion of the Staggers Act which amended the original Rock Island Act was first introduced on the floor of the House of Representatives, shortly before the bill was passed, complaints were voiced that members had not even had time to read the "massive document" before it was to be considered by the House. 126 CONG. REC. H 8576 (daily ed. September 9, 1980) (remarks of Rep. Sebelius). The meager legislative history behind the passage of the Staggers Act amendments to the original Rock Island Act is thus sharply distinguishable from the Surface Mining Act, sustained in *Hodel v. Virginia Surface Mining & Reclamation Ass'n, supra*, 101 S.Ct. at 2361 and n.19, which "became law only after 6 years of the most thorough legislative consideration."

would in no way, despite the Act's preamble, maintain the "uninterrupted continuation of service over Rock Island lines" or prevent the "cessation" of service over those lines. As Judge McGarr stated (J.A. 152a-153a):

> There is in . . .the preamble, a basic illogic, a basic contradiction which I'm at a loss to understand. What the statute addresses itself to is labor protection for those employees who will not be absorbed by whatever segments of the Rock Island are continuing to operate, and therefore the purpose of uninterrupted continuation of services over Rock Island Lines, as part of the preamble to this statute, remains . . . to me, something of a mystery. The important thing to remember is that whatever public purpose and public interest there remains in this case is the problem of the other carriers and the Interstate Commerce Commission and the ongoing supervision by the I.C.C. of the operations of the other carriers over Rock Island Lines that they may have acquired. But, the Rock Island is a bankrupt corporation with no more operations, nothing left but assets and creditors and liquidation. Whatever obligations it may have to labor, and any appropriate claims of labor under existing bankruptcy law is under the Railroad Retirement Act or any other statute which operates to fix the rights of labor. . . . [T]hese are all based upon existing law, existing rights, existing contracts, and that Congress believes that it can legislate a $75 million labor protection burden on the assets of the Rock Island comes to me as a startling concept. That the Government will lend or the FRA will lend the $75 million is irrelevant in the face of the fact that obviously that becomes a claim against the Estate in derogation of the rights of the creditors in whatever assets the Estate now has.

In short, where property is being sought to benefit only the public interest, the conclusion is inescapable that there has been a taking of private property for the public good for which adequate compensation is required.

III.

THE ROCK ISLAND ACT DEPRIVES THE ROCK ISLAND ESTATE OF DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AMENDMENT AND CONTRAVENES THE UNIFORMITY REQUIREMENT IN THE BANKRUPTCY CLAUSE.

The Rock Island Act is an extreme but fortunately rare example of legislative disregard for basic constitutional principles. It is constitutionally deficient in several respects.

A. The Legislative Direction As To How The Judiciary Should Decide This Particular Case Contravenes The Doctrine Of Separation Of Powers And The Due Process Clause.

By enacting the Rock Island Act, Congress improperly interjected itself into a single piece of litigation in an attempt to direct the outcome of that litigation. The Act was passed five years after the reorganization proceedings were initiated, four months after the reorganization court had determined that liquidation was in the best interests of the estate and was consistent with the public interest, and one week after the Commission expressed its agreement with that conclusion. Congress was aware, at the time of the passage of the Act, of the unbroken line of I.C.C. precedent that held that no labor protection should be imposed in system-wide abandonments. Moreover, Congress had been aware since April 14, 1980, that the district court intended to rule on abandonment and the related issue of labor protection on Monday, June 2, 1980. Despite all of this, on Friday, May 30, 1980, the Rock Island Act was enacted into law, ordering the estate to pay immediately up to $75 million to its former employees, to the detriment of the existing unsecured creditors and shareholders, and possibly the secured creditors as well. In October, 1980, Congress

re-enacted the same labor protection scheme after Judge McGarr had found it to be unconstitutional and after the matter had been submitted to this Court for review.

The Rock Island Act forbids the reorganization court to follow precedent or to give effect to the evidence before it that the imposition of labor protection is unfair, inappropriate and unconstitutional. The statute applies only to the action of the reorganization court in this particular case, and the Act requires that the reorganization court enforce whatever order the I.C.C. enters. *See* Sections 106(c), (e)(2) and 110(b).

Congress has the power to enact uniform bankruptcy laws and laws regulating commerce. It does not have the power to tell a particular court what orders to enter in a particular case. That is the exercise of judicial power, which the doctrine of separation of powers and the constitutional structure based upon that doctrine commits to the judiciary, not the legislature.

This Court has described "the doctrine of separation of powers" as "at the heart of our constitution", recognizing that the "practical statesmen" who met in Philadelphia "viewed the principle of separation of powers as a vital check against tyranny." *Buckley v. Valeo*, 424 U.S. 1, 119, 121 (1976). "This Court has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decisions of cases or controversies properly before it." 424 U.S. at 123. *See also United States v. Nixon*, 418 U.S. 683, 703-04 (1974); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-88 (1952).

It is true that "the separate powers were not intended to operate with absolute independence". *United States v. Nixon, supra*, 418 U.S. at 707. But,

> it is a breach of the National fundamental law if Congress . . . attempts to invest itself or its members with either executive power or judicial power.

Buckley v. Valeo, supra, 424 U.S. at 121-22, *quoting Hampton & Co. v. United States*, 276 U.S. 394, 406 (1928).

In *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), this Court invoked the principle that Congress cannot instruct a court how to decide a case or what weight to give to particular evidence. Seven years after authorizing the Court of Claims to return confiscated property to persons who had not supported the late rebellion, Congress in 1870 provided that the Court of Claims could only treat an accepted presidential pardon as conclusively establishing that the recipient had given aid and comfort to the rebellion. In invalidating the 1870 statute, the Court declared in *Klein:*

> The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way?
>
> * * *
>
> But the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary.
>
> We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.
>
> It is of vital importance that these powers be kept distinct.

80 U.S. (13 Wall.) at 146-47. Ninety years later, Mr. Justice Harlan's plurality opinion in *Glidden Co. v. Zdanok*, 370 U.S. 530, 568 and n.33 (1962), approved *Klein*, concluding that it is unconstitutional for the legislature "to invade the judicial province by prescribing a rule of decision in a pending case." *See Kilbourn v. Thompson*, 103 U.S. 168, 194 (1880). *See also* Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM.L.REV. 371, 383 (1976).

Separation of powers means that the judiciary, not the legislature, is to exercise judicial power. Though Congress may pass laws which prescribe rules to govern the public, it may not decide particular cases. Because Congress seldom endeavors to do so,

this Court rarely has had occasion in recent years to review "legislative justice". With respect to the occasional examples of legislative justice which continued into the early part of the last century, Roscoe Pound wrote in 1914,

> [L]egislative justice in its relatively short history in this country and in the relatively small number of cases in which it was exercised showed the influence of personal solicitation, lobbying and even corruption far beyond anything which even the most bitter opponent of our judicial system has charged against the courts in the course of a long history and after disposition of a huge volume of litigation.
>
> Legislative justice has always proved highly susceptible to the influence of passion and prejudice. . . .
>
> Closely related to the foregoing characteristic of legislative justice is . . . the preponderance of purely partisan or political motives as grounds of decision.
>
> * * *
>
> Hence from the Twelve Tables to modern constitutions men have agreed in prohibiting [legislative justice]. The provisions of modern constitutions in this respect represent more than the influence of eighteenth-century theory. They represent a universal experience of the ills involved in legislative justice.

Pound, *Justice According To Law: Legislative Justice,* 14 COLUM.L.REV. 1, 8-10, 12 (1914) (footnotes omitted). There can be no assurance that Congress was free from the types of pressure referred to by Dean Pound when, at the urging of the railway labor unions, 126 CONG. REC. H 8548-49 (daily ed. Sept. 9, 1980) (remarks of Rep. Staggers), it enacted the Rock Island legislation during an election year.

For a legislature to provide that a court in a pending suit must order a named party to pay other parties a large sum of money would deprive the named party of due process in the most basic, procedural sense of that term. Such legislative interference with

the judicial process would deprive the adversely affected party of his right to a decision by a tribunal that has given him a fair hearing, and would seriously disrupt the proper exercise of judicial power by the judiciary.

In *Hurtado v. California*, 110 U.S. 516, 535-36 (1884), this Court held that legislative transfers of one person's property to another violate due process. The Court stated:

> But it is not to be supposed that these legislative powers are absolute and despotic and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. *It must be not a special rule for a particular person or a particular case....* [It would exclude,] as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, *and acts directly transferring one man's estate to another*, legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation.

(Emphasis supplied.) *Accord*, *Lovett v. United States*, 66 F.Supp. 142, 151-52 (Ct. Cl. 1945), *aff'd*, 328 U.S. 303 (1946).

For Congress to direct the reorganization court to decide this case contrary to what the court had already determined was required by the Constitution is a flagrant departure from established constitutional principles and a transparent attempt to impose legislative justice. Whatever sympathy the condition of former railroad employees represented by strong unions can invoke, this cannot justify legislative intervention in a judicial proceeding in order to deprive the estate, its creditors and shareholders of their legal rights.

B. The Rock Island Act Violates Both The Uniformity Requirement Of The Bankruptcy Clause And The Equal Protection Component Of The Due Process Clause Of The Fifth Amendment Because It Applies Only To One Company.

The Rock Island Act, insofar as here relevant, applies only to the estate of the bankrupt Rock Island Railroad. This is evident

from its title and preamble. The Act violates both the uniformity requirement of the Bankruptcy Clause and the equal protection requirement of the Due Process Clause because it imposes a special costly obligation on that estate and no one else.

1. The Rock Island Act Contravenes the Uniformity Requirement in the Bankruptcy Clause.

The uniformity provision in the Bankruptcy Clause, art. I, § 8, cl. 4, provides that Congress shall have the power "to establish uniform laws on the subject of bankruptcies throughout the United States." This Court has said that "[t]he laws passed on the subject must, however, be uniform throughout the United States . . . [the] uniformity [required] is geographical. . . ." *Hanover National Bank v. Moyses*, 186 U.S. 181, 188 (1902).

The Rock Island Act seeks to determine the rights of creditors and shareholders to a bankrupt's estate. It is, therefore, a law "on the subject of bankruptcies." *Wright v. Union Central Life Insurance Co.*, 304 U.S. 502, 513 (1938); *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island and Pacific Railway*, 294 U.S. 648, 673 (1935). A law on bankruptcy "includes the power . . . to distribute [the insolvent debtors'] property." *Hanover National Bank v. Moyses, supra*, 186 U.S. at 188.[23]

[23]Even if this legislation were regarded as an exercise of Congressional power under both the Commerce Clause and the Bankruptcy Clause, it is settled that the broad commerce power is limited by a number of more specific constitutional provisions. The limitations in the First, Fourth, Fifth, Sixth, Seventh and Eighth Amendments, for example, apply to the enforcement of laws regulating interstate commerce. So do the provisions in art. 1, § 9, prohibiting bills of attainder and *ex post facto* laws, and laws imposing export duties or preferring the ports of one state over those of another. The qualification of a broad constitutional provision by a more specific one is analogous to the "basic principle of statutory construction that a specific statute controls over a general provision. . . ." *HCSC-Laundry v. United States*, 101 S.Ct. 836, 838-39 (1981); *Busic v. United States*, 446 U.S. 398, 406 (1980); *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961).

In the *3R Act Cases, supra*, 419 U.S. at 159, this Court recognized that distinctive treatment of railroad bankruptcies, which presented special problems of their own, was not "beyond the limit of congressional power", citing *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island and Pacific Railroad*, 294 U.S. 648, 671-72 (1935). In the *3R Act Cases*, this Court permitted distinctive treatment of railroad bankruptcies in the Northeast region while preserving the uniformity requirement. The Court there was faced with legislation designed to remedy the emergency created when rail service throughout the Northeast was threatened with financial collapse. The Court upheld the legislation designed to resolve these "geographically isolated problems." *3R Act Cases, supra*, 419 U.S. at 159. The Act was found not to contravene the uniformity requirement, despite its limited territorial application, because "the legislation applies to all railroads under reorganization pursuant to § 77 during the time the Act applies." 419 U.S. at 161.

None of the circumstances that justified the holding in the *3R Act Cases* is present here. At the time the Rock Island Act was enacted, another railroad besides the Rock Island was in the process of liquidation under Section 77 of the Bankruptcy Act of 1898,[24] the New York, Susquehanna and Western Railroad.[25] The Rock Island Act, however, does not affect that bankrupt estate. Accordingly, the Act cannot even achieve the technical uniformity that was characteristic of the 3R Act.

Additionally, the Rock Island Act, unlike the 3R Act, does not purport to solve an emergency created by unique geographical problems. It deals solely with the financial situation of employees of a single carrier who are no longer needed in the rail industry.

[24]Section 77 has now been replaced by Sections 1161-74 of the Bankruptcy Code of 1978, 11 U.S.C. §§ 1161-74. Sections 1161-74 apply to all proceedings filed after September 30, 1979. One additional company performing rail service is liquidating under this new statute. *In Re Auto-Train Corp.*, 7 Bkrptcy. Ct. Dec. 906 (D.D.C. 1981).

[25]*In re New York, S. & W. R.R.*, No. B-76-182 (D.N.J.).

This situation, however, is not unique to the Midwest; it occurs whenever a railroad in any region of the country abandons its operations.

Finally, the Rock Island Act "is as far from being uniform as is possible" because it applies to only a single bankrupt. *In re Sink*, 27 F.2d 361 (W.D. Va. 1928), *appeal dismissed*, 30 F.2d 1019 (4th Cir. 1929). Although Congress under the Bankruptcy Clause can create classes of debtors, it cannot read the uniformity provision out of the Constitution. If there is to be uniform bankruptcy legislation, the legislation cannot be limited in application to a single bankrupt. Assuming for the sake of argument that railroads in liquidation constitute a rational classification, the Rock Island Act fails to achieve uniformity even as to this limited class. Only one of the two railroads which have been in liquidation in recent Section 77 proceedings, the New York, Susquehanna & Western Railroad[26] and the Rock Island, has been directed by Congress to make labor protection payments.[27]

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[26]In refusing to impose labor protective conditions on the Susquehanna, the reorganization court in that case observed that "[t]he facts of *Rock Island* are strikingly similar to the circumstances which obtain here." *In re New York, Susquehanna & Western R.R.*, 504 F.Supp. 851, 863 (D. N.J. 1980).

[27]The Milwaukee Railroad continues to pursue an income-based reorganization; it is not in liquidation. The labor protection program for displaced former employees of the Milwaukee Road contained in the Milwaukee Act was enacted by Congress upon the urging of the Milwaukee Road Trustee and the railroad unions. The Milwaukee Road, while abandoning all of its Western extension lines, continued in rail service operating a Midwest core. This large-scale abandonment was nevertheless only a partial abandonment and thus was subject to the condition that the employees displaced receive the form of labor protection traditionally imposed by the Commission in partial abandonment situations. See *supra* at 30. The total cost to the Milwaukee Road Trustee of that traditional form of labor protection was estimated to be somewhere between $300 million and $1.2 billion—with $350 million as the best estimate. *See In re Chicago, M., St.P. & P.R.R.*, Nos. 80-1347, 80-1348, 80-1545 and 80-1546, slip op. at 11 and n.7 (7th Cir. Aug. 17, 1981).

(Footnote continued on following page.)

From whatever perspective it is viewed, the Rock Island Act fails to achieve any semblance of uniformity. It does not apply to all railroad reorganization proceedings pending at the time of its passage. It does not apply to all members of the same class of bankrupts. It does not apply to all railroads in liquidation. It is "as far from being uniform as is possible." *In re Sink*, *supra*, 27 F.2d at 361. If the uniformity provision of the Bankruptcy Clause is to retain any meaning, this Court must find the Rock Island Act constitutionally defective because it represents an attempt by Congress to enact a special bankruptcy law for a single debtor.

2. The Rock Island Act Violates the Equal Protection Component of the Due Process Clause.

The equal protection component of the Due Process Clause is designed to insure that laws imposing burdens will apply equally to persons similarly situated, and will not apply only to particular persons selected by the legislature. A law which on its face regulates only a particular person is as at least suspect, as presumptively depriving that person of equal protection. The burden, however it be phrased, should be on the party attempting to justify the legislative selections.

Appellees recognize that in highly unusual circumstances there can be "a legitimate class of one". *Nixon v. Administrator of*

(Footnote continued from preceding page.)
Congress, by enacting the Milwaukee Act's labor protection program providing for an elective new labor protection program of up to $75 million, relieved the Milwaukee Road Trustee of the immense burden of the traditional labor protection conditions that would have been imposed in this partial abandonment situation. As a result, the Milwaukee Road Trustee advocated passage of the labor protection scheme of the Milwaukee Act. By contrast, the Rock Island Trustee, its creditors and shareholders opposed passage of the labor protection scheme of the Rock Island Act because the Rock Island was being totally abandoned and under settled Commission precedent and constitutional principles, see *supra* at 24-34, was not subject to any labor protection obligation.

General Services, 433 U.S. 425, 472 (1977). The Rock Island, however, was not in a unique situation. Other railroads have become bankrupt and cashless and then discontinued operations. The Susquehanna Railroad was in that condition at the time the Rock Island Act was passed, *In re New York, Susquehanna and Western Railroad, supra*, 504 F.Supp. 851. Yet Congress did not impose a heavy financial burden on the Susquehanna estate. Nor does it matter that the Susquehanna is smaller than the Rock Island. Bankrupt railroads, like any other category of bankrupts, are never identical in all respects. But that distinction does not justify special legislation applicable to a single company when the subject is one which can be dealt with by general legislation applicable to all railroads, all bankrupt railroads, or at least to a defined class. *3R Act Cases, supra*, 419 U.S. at 159-60.

This Court has upheld as not violative of the Equal Protection Clause statutes which contain exemptions from burdensome regulations for a named company or an identifiable small class of persons. *City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (grandfather clause exemption for two pushcart vendors), *overruling Morey v. Doud*, 354 U.S. 457 (1957) (invalidating exemption for American Express Company); *Williams v. Mayor of Baltimore*, 289 U.S. 36 (1933) (tax exemption for insolvent interurban railway); *Erb v. Morasch*, 177 U.S. 584 (1900) (speed of trains running through cities). But these exemptions were for the benefit of the exempted party and left standing general laws applicable to a class of persons. They differ, therefore, from laws imposing burdensome regulations only upon one company. *E.g., McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 86-87 (1916) (adverse presumptions applicable only to a single company); *see Cotting v. Kansas City Stock Yards Co.*, 183 U.S. 79, 112, 114-15 (1901) (Harlan, J., concurring) (equal protection denied by stat-

ute which "applies only to Kansas City Stock Yards Company and not to other companies or corporations engaged in like business").

Because the Rock Island Act subjects only the Rock Island estate to the burden of supporting its former employees after the company had become entitled to cease operations and liquidate, it constitutes an unjustifiable classification in violation of equal protection and therefore of due process.

C. The Retroactive Imposition Of Additional Liability To Employees After The Rock Island Has Been Ordered To Liquidate Deprives The Rock Island Estate Of Due Process Of Law.

Assuming, *arguendo*, that Congress has the power to require prospectively that railroads must provide their former employees with labor protection even in the circumstance of liquidation and total abandonment, investors and sellers of supplies in that situation would know in advance that they were exposing themselves to the risk of losing their entire investments in order to subsidize unneeded railway laborers—and could protect themselves by refusing to advance credit. Perhaps Congress has not passed such a law for fear of this obvious result. *See Louisville Joint Stock Land Bank v. Radford, supra*, 295 U.S. at 595 n.27.

The question in this case is not whether such prospective legislation is constitutionally permitted, but whether Congress may impose a new liability retroactively—after the security holders and suppliers have advanced credit or the stockholders made their investments; after the railroad has been found not only to be bankrupt but also unable to reorganize as an operating carrier on an income-producing basis; and after it has been ordered to

liquidate and to abandon its lines.[28] The answer is that in the context of these proceedings this retroactive legislative action violates the due process rights of the estate and its creditors and shareholders to have the remaining assets of the estate distributed for their benefit in the prescribed order of priority.

The unfairness of imposing after-the-fact liability is recognized in law and in life. Rules are not to be changed after the beginning of the game. The principle that laws will be construed to apply prospectively, not "retroactively unless the legislature has plainly commanded that result", *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 368-69 (1980), *aff'g*, 592 F.2d 947 (7th Cir. 1979), *quoting Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 721-22 n.40 (1978), and the constitutional prohibition against *ex post facto* criminal laws are illustrative. The same principle is embodied, though more flexibly, in the Due Process Clause, because, in the absence of some special justification, the imposition of burdensome civil liability after the fact is also arbitrary and unreasonable.

[28]RLEA and the Government reiterate that Judge McGarr's June 2, 1980 order of abandonment was issued three days after the President signed the Rock Island Act. RLEA Br. 13, 41, Govt. Br. 35. They imply that because the Rock Island Act was signed into law before the formal abandonment order issued, the Act's obligations were not retroactively imposed on the Rock Island estate. Appellees do not believe that the merits of this case should turn on who won this "race to the courthouse".

In any event, Judge McGarr's order to liquidate the railroad was entered January 25, 1980. Judge McGarr's order of April 14, 1980, stated that he would rule on the petition for abandonment and the attendant labor protection issue on June 2, 1980. Thus, Congress was fully aware at the time it passed the Rock Island statute that the Rock Island was being liquidated. As Judge McGarr expressly stated, the June 2, 1980 order was merely a "technical recognition" of the Rock Island's already ripe constitutional right to withdraw from rail service. (J.A. 264a.)

Additionally, if the Staggers Act is necessary to cure deficiencies in the original Rock Island Act, as Congress seemed to suggest by the passage of the Staggers Act after the original Act was declared unconstitutional and was before this Court on review, then the effective law, *i.e.*, the original Act as amended by the Staggers Act, was not passed until long after the formal certificate of abandonment was issued.

For example, in *Usery v. Turner Elkhorn Mining Co., supra*, 428 U.S. at 16-17, the Court recognized that a retroactively imposed obligation is especially vulnerable:

> It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.

Despite this vulnerability, the Court found that imposing liability on the coal operators who had profited at the expense of the health of their former employees was a rational means to allocate the horrendous medical costs incurred by those former employees who contracted black lung disease during their employment. 428 U.S. at 17-19. The coal operators had known for at least 20 years that black lung disease was proximately caused by work in coal mines. 428 U.S. at 17. Moreover, as going concerns, the coal operators had future income available to pay for the medical costs associated with the labor that had produced past profits. Thus, these costs for past disabilities could be spread beyond the coal operators to coal consumers as well. 428 U.S. at 18.

No comparable justifications support the imposition of labor costs upon the estate of the Rock Island. Unlike the coal operators in *Usery*, the Rock Island was not a going concern when the statute was passed, but was in the process of liquidation. It will not have future income available to pay for the newly-imposed labor protection, and it cannot adjust future rates to spread these new costs among consumers of rail services. Unlike the coal operators, neither the Rock Island nor its creditors have profited from the prior activities of the Rock Island's former employees in a way that bred debilitating consequences such as black lung disease. The labor protection payments required of the Rock Island are in no way attributable to its prior conduct. Indeed, the unproductive work rules and the strike of the former employees were at least partly responsible for the disastrous condition of the railroad, and

these former employees benefited by their employment for almost five years while the estate was in reorganization, to the substantial detriment of the estate. See *supra* at 6.

This case is like *Railroad Retirement Board v. Alton Railroad*, 295 U.S. 330 (1935), in which, as this Court noted in *Usery*, 428 U.S. at 19, Chief Justice Hughes and Justices Brandeis, Stone and Cardozo joined with the majority in invalidating a retroactive statutory provision requiring employer-financed pensions for persons who had been employed by the railroads during the year before the statute was enacted. 295 U.S. at 348-50. In *Usery*, this Court assumed that this portion of *Alton* retained its vitality but found *Alton* distinguishable on grounds which make *Alton* applicable here (428 U.S. at 19):

> The point of the black lung benefit provisions is not simply [as in *Alton*] to increase or supplement a former employee's salary to meet his generalized need for funds. Rather, the purpose of the Act is to satisfy a specific need created by the dangerous conditions under which the former employee labored—to allocate to the mine operator an actual, measurable cost of his business.

Here, in contrast, the only effect of paying additional sums to former Rock Island employees is to meet their generalized need for funds.

The weight of the *Alton* case is not impaired by *Nachman*, *supra*, 446 U.S. 359, decided by this Court in 1980. The *Nachman* case was concerned with the federal program to insure unfunded but vested pension benefits for employees where the employer had terminated the plan, pursuant to its terms, before the effective date of the federal statute, thereby limiting the employer's liability under the plan to the amount in the fund. The court of appeals upheld the validity of the statute on the basis of its analysis of the *Usery* case and this Court's subsequent decision in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). Although this Court limited its grant of certiorari in *Nachman* to the question of

statutory construction (446 U.S. at 368), it quoted with approval from the opinion below on the constitutional issue. 446 U.S. at 367-68 n.12, quoting from 592 F.2d 947, 962-63 (7th Cir. 1979).

In balancing the equities, the court of appeals in *Nachman, supra*, 592 F.2d at 962, noted:

> In [*Spannaus*], and *Alton Railroad* the Court emphasized that the employer was being forced to pay added compensation for fully compensated services. The employers received no benefit in the bargain. [The employers in *Alton Railroad*] had never agreed to pay any retirement benefits.

The same is true here. In *Nachman*, the court of appeals noted that the reliance interest of the employees in vested pension benefits "outweighed the employer's reliance on prior funding", that is, on the right to pay no more than the amount in the fund. 592 F.2d at 961-62. Moreover, unlike the situation in *Nachman*, 592 F.2d at 962 n.32, the Rock Island estate had vested rights which were being curtailed; its former employees had no vested rights.

Additionally, in sharp contrast to the Rock Island Act, in the statute under review in *Nachman*, "Congress provided net worth limitations on the amount of potential liability" in order to protect employers "on the verge of bankruptcy," and "devised other provisions to temper the burdens imposed." 592 F.2d at 963. In sum, the rational bases supporting the "not wholly prospective" *Nachman* statute do not support the wholly new after-the-fact liability imposed upon the Rock Island. Indeed, no rational basis exists for imposing new liability to former employees upon the creditors and shareholders of a bankrupt, non-operating and unreorganizable railroad.

The retroactive imposition of a $75 million labor protection claim would be particularly offensive to the rights of secured creditors. Congress cannot retroactively impair a secured creditor's right to obtain full satisfaction of the debts owed to it by a

bankrupt estate. *Louisville Joint Stock Land Bank v. Radford, supra,* 295 U.S. 555. In *Radford*, this Court held that an attempt by Congress to take from secured creditors without compensation "rights in specific property which are of substantial value" violates the Taking Clause. 295 U.S. at 601. The *Radford* principle requires that no labor protection costs can be imposed on the estate unless it is first determined that these retroactive costs will not impinge upon the secured creditors' right to obtain full satisfaction of their claims.

The Rock Island Act violates the Due Process Clause in the separate respects argued above. The cumulative effect of these various impingements even more clearly establishes that the Act violates the concept of fundamental fairness embodied in due process.

IV.

THE MERE POSSIBILITY OF A SUBSEQUENT TUCKER ACT REMEDY DOES NOT PRECLUDE THIS COURT FROM ENJOINING THE IMPLEMENTATION OF THE ROCK ISLAND ACT OR FROM DECIDING THE TAKING ISSUE NOW.

RLEA argues that the Rock Island estate must immediately make the labor protection payments required by the Rock Island Act but that this Court should defer a determination of whether the Act compels a taking for which compensation is required until a subsequent proceeding by the estate against the Government under the Tucker Act. The argument for deferral of the taking issue is based on the language of Section 124(c), which was added to the original Rock Island Act by the Staggers Act:

> Nothing in this Act . . . shall limit the right of any person to commence an action in the United States Court of Claims under section 1491 of title 28, United States Code (commonly referred to as the "Tucker Act").

The Tucker Act, although it permits suit in the Court of Claims "upon any claim against the United States founded . . . upon the Constitution", 28 U.S.C. § 1491, does not provide the Government with blanket authority to violate constitutional rights simply because the injured party may have an action for damages under the Act. Moreover, even if it did, and the existence of a subsequent Tucker Act remedy were held to permit the labor protection program of the Act to be immediately implemented, this Court should still determine the taking issue now.

A. The Fact That A Subsequent Action For Damages Under The Tucker Act Is Not Precluded Does Not Bar This Court From Enjoining The Implementation Of An Unconstitutional Act.

The thrust of RLEA's Tucker Act argument is that no taking is unconstitutional so long as there remains the possibility of an action for damages under the Tucker Act. This argument focuses solely on the taking issue and ignores the other respects in which the Rock Island Act violates constitutional provisions which protect the Rock Island estate, its creditors and shareholders—*viz.*, the principle of separation of powers, the uniformity provision of the Bankruptcy Clause, and the Due Process Clause. The Rock Island Act is unconstitutional not only because it violates the due process rights of the creditors and shareholders of the Rock Island to withdraw their investments from the service of the public interest under *Brooks-Scanlon, supra,* but also because the Act singles out one bankrupt estate and legislatively dictates a decision in a pending judicial proceeding, displacing rights of both creditors and shareholders that had already vested under prior law when the Act was adopted. Thus, the possibility of a subsequent action for damages under the Tucker Act does not cure the constitutional defects that otherwise exist in the Rock Island Act wholly apart from the taking issue, nor does it bar an injunction against the implementation of the Act.

Even focusing solely on the taking issue, RLEA's view that the Tucker Act cures all evils is unduly simplistic:

> Even in a situation where there is no justification for the government's refusal to accept a complainant's assertion that the assailed action is a taking, such a haughty attitude on the government's part does not make the assailed taking unconstitutional because the provision for compensation in the Tucker Act satisfies the guarantees of the Taking Clause.

RLEA Br. 34. The primary difficulty with this argument is that it has no limits: it would allow the Government to blatantly violate constitutional rights so long as it does not immunize itself from a later suit for damages. Under this view, no taking could ever be enjoined because a Tucker Act damage remedy would always be available.

The argument is refuted by *Youngstown Sheet & Tube Co. v. Sawyer, supra*, 343 U.S. at 584-85, in which this Court held unconstitutional, as violative of the separation of powers doctrine, President Truman's executive order seizing vital steel mills that had been shut down by a labor dispute during time of war. In that case, it was argued that a preliminary injunction should have been denied because the companies could recover full compensation for the taking in the Court of Claims under the Tucker Act. The Court rejected that argument. Despite the compelling needs of the nation in time of war, the Presidential taking involved in *Youngstown* was enjoined. Here, seizure of the Rock Island's money is sought in much less compelling circumstances—where the causal relation between the taking and the advancement of national transportation policy is attenuated at best. The *Youngstown* decision establishes that the existence of a Tucker Act remedy does not preclude enjoining a taking, especially when the taking violates the Constitution wholly apart from the question of whether just compensation will be provided.

The *Youngstown* decision provides the appropriate limitation upon the Government's right to rely on the availability of a

Tucker Act damage remedy to excuse unconstitutional conduct: when the Tucker Act remedy would as a practical matter not provide adequate relief, an injunction may appropriately be granted. The Court in *Youngstown* found "no reason for delaying decision of the constitutional validity of the [seizure] orders", in light of the fact that

> seizure and governmental operation of these going businesses were bound to result in many present and future damages of such nature as to be difficult, if not incapable, of measurement.

343 U.S. at 585.

In this case, forcing the already bankrupt and defunct Rock Island to make what is tantamount to a $75 million loan to the Government would result in irreparable injury to the estate through the material disruption of the ongoing liquidation. The reorganization court found that the payment of $75 million would represent "a significant percentage of the [estate's] total assets" (J.A. 207a) and would disrupt the process of liquidation. As the court recognized, no plan of reorganization providing for distribution can be meaningfully formulated or carried out when up to $75 million of the estate's assets have been replaced by an uncertain claim, which is dependent on the outcome of litigation in the Court of Claims and Congress' later appropriation of funds.[29]

This disruption and delay of the liquidation would have a significant impact on the creditors of the estate, including both large

[29]Indeed, Judge McGarr recently explained to a representative of a state which was complaining that there was no formal plan of liquidation:

> "I have deferred the filing of a formal plan from time to time for a lot of reasons. The principal one lately being an Act of Congress which I have held unconstitutional would raid the Rock Island Trustee's treasury to the extent of seventy-five or more millions of dollars, and if that is constitutional we have a far different asset picture than otherwise."

Transcript of Proceedings, August 25, 1981, at 15.

and small investors and suppliers, who have been awaiting payment from the railroad for years. They, and persons to whom they owe money, may themselves be in difficult financial straits because of the failure of the Rock Island to pay its debts. The delay in liquidating the estate will cause injury to a great many creditors and investors for many more years. As Judge McGarr stated at the hearing on June 20, 1980 (J.A. 179a):

> We are tempted to think of the creditors in this case, because they have been active in the case as banks and bondholders and so forth, but my desk is piled high with letters that I have been receiving for many, many months from small businesses and small [taxing] authorities and school districts and from all through the Middle West and the area that the Rock Island serves, telling tales of extreme hardship that have been occasioned by the failure and inability of the Rock Island to pay its bills. These are not giants, they're not banks. They're people upon whom the hardships of the abandonment of the service of the Rock Island and its bankruptcy falls every bit as harshly as the same problems fall on the employees.

RLEA does not address the reorganization court's finding of irreparable injury. It argues instead that the estate may be compelled to turn over its money, without regard to whether the estate is obligated to pay that money, because the Rock Island may eventually be able to sue the Government for damages. No case has ever held that the Government can compel a person to turn over his money, either to the Government itself or to a beneficiary specified by the Government, without regard to whether the person is obligated to pay that money, merely because he can eventually sue the Government for damages in an effort to get it back. If such forced loans were constitutionally permissible, Congress could order citizens with available funds to pay any public expense, as long as they could then sue under the Tucker Act to seek reimbursement. Often Congress is unwilling to face up to the need for spending money as rapidly as the public interest requires. Or it may be pressed to provide money to politically desirable

causes although its budget is insufficient to fund the requests. If carried to its logical conclusion, RLEA's Tucker Act argument would permit Congress to shift the burden of any public project to named persons by deferring to a much later date the resolution of whether the Government's action was constitutional. The Tucker Act obviously was not intended for such a purpose—nor has it been used for such a purpose up to now.

In the cases in which the availability of a Tucker Act remedy has been held to satisfy constitutional standards, one of two elements was present: (1) the public interest required the immediate application of particular non-fungible property to a particular purpose; (2) there was no showing that any property interest definitely would be taken. Thus, in the *3R Act Cases*, *supra*, 419 U.S. at 156, specific rail property was required to permit the creation of Conrail and to prevent chaos in rail transportation in the Northeast; there was no certainty that the assets of the former private railroads conveyed to Conrail, measured against the one and one-half billion dollars held in escrow, would leave a constitutional shortfall for which additional compensation might be due, but the Court found that if a shortfall occurred, it would constitute a taking for which just compensation was required. In *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 86 (1978), there was no showing that there would be a taking unless an unprecedented nuclear disaster occurred; in *Dames & Moore v. Regan*, 101 S.Ct. 2972 (1981), there was no showing that there would be an uncompensated taking because the claims of the Americans may well be fully satisfied by the Special Claims Tribunal; in *Hurley v. Kincaid*, 285 U.S. 95 (1932), specific land had to be utilized to prevent flooding in the area, and there was no showing that the land in question would be flooded more often after the new levees were built than it was before. *See also Hodel v. Virginia Surface Mining & Reclamation Ass'n*, *supra*, 101 S.Ct. 2352, 2369-70 (1981) and *Hodel v. Indiana*, 101 S.Ct. 2376, 2388 (1981), in which this Court found that no showing

had been made that the statute under review would impair, or to what extent it might impair, the beneficial use of any particular coal mining land.[30]

In this case, neither element is present. This case is different from those cases in which the Tucker Act remedy has been treated as a sufficient remedy not only because this case involves a taking which is unconstitutional in several respects even if it is later fully compensated, but also because the Government is seeking to take money, not specific property or any rights connected with the specific property needed for a particular public purpose. Unlike the situation in *3R Act Cases*, where the Government had an urgent need for specific rail properties to maintain rail service in the Northeast, here the Government cannot claim a specific need for funds from a bankrupt estate. The Rock Island estate's money is no different from any other. Moreover, it is certain that the Act will cause a taking of the Rock Island's money. Thus, that Congress did not specifically preclude a later Tucker Act remedy is insufficient to cure the constitutional defects which the reorganization court found in the statute. At a minimum, Judge McGarr did not abuse his discretion in finding it likely that the Act remained unconstitutional and that the estate would be irreparably harmed by its implementation.

B. In The Alternative, Whether Or Not The Availability Of A Tucker Act Remedy Cures The Constitutional Defects Of The Rock Island Act, This Court Should Determine The Taking Issue Now.

If this Court were to hold that even if there were a taking the Tucker Act remedy would provide "just compensation", and thus

[30]The other case upon which RLEA relies, *Coffman v. Breeze Corporations*, 323 U.S. 316 (1945), is also inapposite. In *Coffman*, the effect of the challenged Royalty Adjustment Act was merely to delay the payment of patent royalties. This Court held that plaintiff was requesting "an advisory opinion" as to the statute's constitutional validity at least in part because another suit was pending in which the plaintiff's entitlement to the royalties would be determined. 323 U.S. at 321, 324.

satisfy that constitutional requirement, the Court should nevertheless proceed to decide the taking issue now. Decision of that issue should not be deferred to a subsequent Tucker Act proceeding. The Government agrees and states cogent reasons why the taking issue should be decided at this time. Govt. Br. 17-20.

This Court was confronted with a parallel question in the *3R Act Cases, supra*, 419 U.S. at 149-50 n.36. The question there was whether to defer to a later Tucker Act hearing the issue of whether consideration for the possible taking was required to be in cash. The Court said,

> To delay until any Court of Claims adjudication with respect to the *form* of consideration provided by the Act would be exceedingly irresponsible: while the fact that Congress did not contemplate a taking does not pretermit a Tucker Act remedy, it does suggest that Congress might wish to consider whether to abandon the whole Act if it turned out that the *entire* value of the rail properties must be paid in cash.

Id. (emphasis original). Precisely the same considerations are present in the case at bar. As the Government points out, Govt. Br. 19, Congress may wish to consider whether to "rescind the regulation or pay just compensation." Indeed, Congress has preserved this option for itself by the expedited review procedures of Sections 106(d) and 124 of the Rock Island Act, which insured that the Seventh Circuit would rule on the constitutionality of the Act within 60 days. These special procedures, as the Government suggests, enable Congress to reconsider the matter if it turns out that it has to foot the bill.

There can be no doubt that the question of whether the Rock Island Act effects a taking is justiciable and ripe for review by this Court inasmuch as the event that constitutes the taking and its impact on the Rock Island estate are certain, not hypothetical or speculative. *Cf. 3R Act Cases, supra*, 419 U.S. at 143; *Youngstown Sheet & Tube Co.* v. *Sawyer, supra*, 343 U.S. at 548-85.

This distinguishes other cases relied upon by RLEA in which the Court has declined to decide a taking issue because of the existence of a remedy in the Court of Claims. See Govt. Br. 18. Moreover, appellees have included, as part of the prayer in their complaint, a request for a declaratory judgment under 28 U.S.C. § 2201 as to the constitutionality of the Act. See J.A. 21a-41a.

For the foregoing reasons, appellees agree with the Government that the taking issue should be decided now and should not be deferred to a subsequent proceeding under the Tucker Act.

CONCLUSION

This Court should dismiss the appeal in No. 80-415, for the reasons stated *supra* at 2–3. As to the appeal in No. 80-1239, this Court should affirm Judge McGarr's order of October 15, 1980, continuing in effect his preliminary injunction of June 9, 1980, on the ground that Judge McGarr was correct as a matter of law in finding the Rock Island Act unconstitutional or, in the alternative, on the ground that he did not abuse his discretion in finding a likelihood that the Act is unconstitutional and that the estate would be irreparably harmed if the Act were immediately implemented.

Respectfully submitted,

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September 26, 1981

APPENDIX A

PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

The appellees in this case are William M. Gibbons, in his capacity as Trustee of the Chicago, Rock Island and Pacific Railroad Company, The First National Bank of Chicago and Continental Illinois National Bank and Trust Company of Chicago, in their capacities as Indenture Trustees, and Henry Crown et al., substantial holders of first mortgage bonds, income debentures and common stock of the Rock Island. Parent companies, subsidiaries and affiliates of the appellees are as follows:

A. William M. Gibbons, in his capacity as Trustee of the Chicago, Rock Island and Pacific Railroad Company

Affiliates

A&M Ry. Bridge & Terminal Co.
The Belt Ry. Co. of Chicago
Calumet Western Ry. Co.
Denver Union Terminal Ry. Co.
Galveston Terminal Ry. Co.
Great Southwest R. R., Inc.
Houston Belt & Terminal Ry. Co.
Illinois Terminal R. R. Co.
Iowa Transfer Ry. Co.
Joliet Union Depot Co.
Keokuk Union Depot Co.
The Minnesota Transfer Ry. Co.
Oklahoma City Jct. Ry. Co.
Peoria & Bureau Valley R. R. Co.
Peoria Ry. Terminal Co.
Peoria Terminal Company
Pullman Railroad Company

Rock Island Improvement Co.
St. Paul Union Depot Co.
Trailer Train Company
Warren & Ouachita Valley Ry. Co.
Wichita Union Terminal Ry. Co.

B. The First National Bank of Chicago

Parent

First Chicago Corporation

Principal Subsidiaries

Network EFT, Inc.
International Commercial Bank Limited
N. V. Slavenburg's Bank

Principal Affiliates

First Chicago Cheque Corporation
First Chicago Trust Company of Arizona
First Chicago Realty Services Corporation
First Capital Corporation of Chicago
First Chicago Fiduciary and Investment Services Corporation
First Chicago Overseas Finance N. V.
First Chicago Financial Corporation
First Chicago Credit Corporation
Real Estate Research Corporation
First Chicago Lease Holdings, Inc.
UBAF Arab American Bank

C. Continental Illinois National Bank and Trust Company of Chicago

Parent

Continental Illinois Corporation

Subsidiaries

Continental International Finance Corporation
Continental Bank International (Texas)
Continental Bank International (Pacific)
Continental Bank International
Conill Bank A.G.
Continental Bank S.A./N.V.
Continental Illinois Bank (Switzerland)
Continental Development Bank, S.A.L.
Underwriters Bank (Overseas) Limited
Continental Illinois Thailand Ltd.

Affiliates

Continental Illinois Leasing Corporation
Continental Illinois Equity Corporation
Continental Illinois Venture Corporation
Republic Realty Mortgage Corporation
Continental Illinois (Canada) Ltd.
Continental Illinois Investment Advisory
Continental Illinois Limited
Continental Illinois International Investment

D. Henry Crown, et al., include the Arie and Ida Crown Memorial, an Illinois not-for-profit corporation, which has no parent, subsidiaries or affiliates.

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Nos. 80-415 and 80-1239

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant,

v.

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; HENRY CROWN, et al.; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and ANDREW L. LEWIS, JR., Secretary of Transportation,
Appellees.

Consolidated Appeals From The United States District Court For The Northern District Of Illinois And From The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENT TO BRIEF FOR THE ROCK ISLAND APPELLEES

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Nos. 80-415 and 80-1239

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant,

v.

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; HENRY CROWN, et al.; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and ANDREW L. LEWIS, JR., Secretary of Transportation,
Appellees.

Consolidated Appeals From The United States District Court For The Northern District Of Illinois And From The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENT TO BRIEF FOR THE ROCK ISLAND APPELLEES

This supplement to the Brief For the Rock Island Appellees,[1] filed September 26, 1981, is submitted to advise this Court of the decision of the United States Court of Appeals for the Seventh Circuit, dated October 13, 1981, affirming the June 2, 1980 order of District Judge Frank J. McGarr (J. A. 269a-271a), by which he confirmed the total abandonment of all Rock Island lines and service and declined to permit the imposition of any labor protec-

[1]The Rock Island Appellees are: William M. Gibbons, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Continental Illinois National Bank and Trust Company of Chicago and The First National Bank of Chicago, as Indenture Trustees for the income debenture holders and first mortgage bondholders respectively, and Henry Crown, *et al.*, substantial holders of first mortgage bonds, income debentures and common stock of the Rock Island.

tion conditions or claims in connection with the Rock Island's abandonment. *In re Chicago, Rock Island & Pacific Railroad Company*, Nos. 80-1788, 80-2199 and 80-2286 (7th Cir. October 13, 1981) (unpublished order), *petition for rehearing filed November 10, 1981*, reprinted as Appendix A hereto.

Judge McGarr's June 2, 1980 order is cited throughout the brief submitted by the Rock Island Appellees as the law of this case with respect to any existing labor protection obligations of the Rock Island estate. The court of appeals' opinion and its affirmance of Judge McGarr's abandonment order establish that: (1) the Rock Island was entitled to abandon all of its rail operations (Slip op. at 4, 12; Appellees' Brief 24-28), and (2) the Rock Island had no labor protection obligations in connection with its total line abandonment (Slip op. at 10; Appellees' Brief 28-34). The court of appeals' conclusion that the Rock Island had no labor protection obligation supports the arguments advanced by the Rock Island Appellees that (1) the Rock Island Act[2] does not discharge any existing obligation of the estate, and therefore confers no benefit on the estate (Appellees' Brief 39-41), (2) the labor protection provisions of the Rock Island Act constitute a taking of the estate's private property for public purposes (Appellees' Brief 34-44), and (3) the Rock Island Act's labor protection provisions are impermissible retroactive impositions on the Rock Island estate (Appellees' Brief 55-60).

The court of appeals' affirmance of Judge McGarr's abandonment order thus provides support for Judge McGarr's finding that the Rock Island Act's labor protection scheme is unconstitutional as a matter of law, and for the position of the Rock Island

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[2]Rock Island Transition and Employee Assistance Act, Pub. L. No. 96-254, 45 U.S.C. §§ 1001-1018, as amended by the Staggers Rail Act of 1980, Pub. L. No. 96-448, Title VII, Section 701, 94 Stat. 1895, 1959.

Appellees that Judge McGarr did not abuse his discretion in enjoining the Act's implementation.

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November 16, 1981

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Argued: June 10, 1980)
October 13, 1981

Before

Hon. LUTHER M. SWYGERT, Senior Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. WILLIAM J. EAST, Senior District Judge*

Nos. 80-1788, 80-2199 and 80-2286

IN THE MATTER OF:

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,

Debtor.

APPEALS OF:

RAILWAY LABOR EXECUTIVE ASSOCIATION (RLEA),

Intervenor.

Appeals from the United States District Court for Northern District of Illinois, Eastern Division.

Nos. 75-B-2697
Frank J. McGarr, *Judge*

Order

Proceedings to reorganize the Chicago, Rock Island and Pacific Railroad Company ("Rock Island") under Section 77 of the Bankruptcy Act of 1938, as amended, 11 U.S.C. § 205 (1976), have been pending before the reorganization court since March 12, 1975. From the date the petition for reorganization was granted, through September 26, 1979, the Rock Island was operated under the direction of William Gibbons (the "Trustee") while attempts were made to devise an income-based reorganiza-

*The Honorable William J. East, Senior District Judge of the District of Oregon, is sitting by designation.

tion. On September 26, 1979, the Rock Island was declared cashless by the Interstate Commerce Commission ("I.C.C."), and it ceased operation as a railroad carrier. On January 25, 1980, after reviewing a Plan of Reorganization submitted by the Trustee, an independent consultant's analysis of the Plan and other submissions, the reorganization court [2] concluded that the core operation proposed by the Trustee was not feasible and ordered the Trustee to file a plan which would provide for the total liquidation of the estate.

On April 14, 1980, the reorganization court entered an order directing the Trustee to file an application with the I.C.C. "for its report confirming the abandonment of the Rock Island's total railroad system subject to sale of portions of such system to other operating entities for their operation thereof." In a report filed on May 23, 1980, in response to the Trustee's application for abandonment, the I.C.C. concluded that "abandonment of the Rock Island and its dissolution as an operating railroad is required by the public convenience and necessity."

On June 2, 1980, the reorganization court held a hearing concerning the proposed abandonment, and ordered systemwide abandonment of the Rock Island's lines and discontinuance of its service.

The RLEA had earlier appealed from the district court's orders authorizing liquidation of the Rock Island. In an unpublished order dated February 11, 1981, this court affirmed the order of the district court, holding that "the reorganization court had the jurisdiction under § 77 to decline to accept the Trustee's Plan and to order the Trustee to formulate a plan of liquidation. Furthermore, the reorganization court properly exercised its jurisdiction."

The present appeal challenges the systemwide abandonment order of June 2, 1980, and, in particular, its treatment of the labor

protection issues. We affirm.[1]

I.

Appellants maintain that the reorganization court's June 2, 1980, order authorizing systemwide abandonment should be reversed because the court failed to (1) conduct an adequate evidentiary hearing, (2) consider the public interest, and (3) provide labor protection.

[3] **A. Evidentiary Hearing**

Section 17 of the 1979 Milwaukee Railroad Restructuring Act ("MRRA") empowers reorganization courts proceeding under § 77 of the Bankruptcy Act of 1938 to "authorize the abandonment of lines of railroad pursuant to section 1170 of title 11." 45 U.S.C. § 915(a) (Supp. III 1979). Section 1170 of the new Bankruptcy Act provides, in relevant part:

> (a) The court, after notice and a hearing, may authorize the abandonment of a railroad line if such abandonment is—
>
> (1)(A) in the best interest of the estate; or
>
> (B) essential to the formulation of a plan; and
>
> (2) consistent with the public interest.

11 U.S.C. § 1170 (Supp. III 1979).

The phrase "notice and a hearing" is defined in § 102(1) of the new Bankruptcy Act as follows:

> In this title—
>
> (1) "after notice and a hearing", or a similar phrase—

[1]The RLEA also challenges the reorganization court's alleged failure to protect the interests of Rock Island employees in its orders authorizing the sale of Rock Island properties to the St. Louis Southwestern Railway Company ("SSW" sale) and to the Missouri Pacific Railroad Company ("Mo-Pac" sale). For the reasons stated in Part II, *infra*, we dismiss RLEA's appeals from these orders as moot.

> (A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances . . .

11 U.S.C. § 102(1) (Supp. III 1979).[2]

Thus, to determine whether Judge McGarr provided an adequate evidentiary hearing in authorizing abandonment of the Rock Island, we must consider the particular circumstances of the case, for the issues addressed at the June 2 hearing were anything but new to the reorganization court, which had been totally immersed in the Rock Island's affairs since March 17, 1975. This process of immersion provided indoctrination in a somewhat lengthy history, informed from time to time by hearings leading to: the Commission's finding in September 1979 that the Rock Island was "cashless"; the court's rejection of the Trustee's plan of reorganization in January, 1980; the [4] recommendation of the court's independent consultant and the court's finding that the Rock Island was incapable of reorganization; the I.C.C.'s recommendation that the Trustee be permitted to abandon all lines because "abandonment of the Rock Island and its dissolution as an operating railroad is required by the public convenience and necessity"; and, finally, the court's liquidation order. Additionally, numerous status hearings were regularly held and reports were filed by the Trustee, all of which were a part of the five-year record before Judge McGarr. We believe that, in evaluating this detailed and instructive history of five years' duration, the court, in the exercise of its discretion, did not err in concluding that, under the particular circumstances before it, an additional evidentiary hearing was not required.

[2]Congress has provided the gloss that "after notice and a hearing" as defined in § 102(1) means "after such notice as is appropriate in the particular circumstances (to be prescribed by either the Rules of Bankruptcy Procedure or by the court in individual circumstances that the Rules do not cover . . .)." H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 315 (1977), *reprinted in* [1978] U.S. Code Cong. and Ad. News 5963, 6272.

But, there is another reason for our conclusion. RLEA was seeking an evidentiary hearing to determine essentially whether the Rock Island was reorganizable—a question that had been previously decided in the negative by the reorganization court in its January 25, 1980, liquidation order. In affirming that order, this court determined that the reorganization court had jurisdiction to order the Trustee to prepare a plan of total liquidation and that the court "properly exercised its jurisdiction" in so ordering. Thus, by June 2, 1980, it had already been decided that the Rock Island was unreorganizable and should be liquidated. And the systemwide abandonment ordered on June 2, in effect, fulfilled an important procedural requirement which was based in large measure on substantive decisions that had already been made. But liquidation could not proceed until abandonment was authorized since, without abandonment authority, the Rock Island was not relieved of its common carrier obligations. *See Gibbons v. Chicago, Rock Island & Pacific R. Co.*, Nos. 79-2413, 80-1111, 80-1383 and 80-1538, slip op. at ___ (7th Cir. October, 1981). Under all these circumstances, a further evidentiary hearing would therefore have served no useful purpose.

B. Public Interest

RLEA urges that the reorganization court failed to consider adequately the public interest in authorizing systemwide abandonment. One purpose of a § 77 reorganization court is unquestionably to preserve the debtor "as a living, not a dying, railroad structure." *Van Schaick v. McCarthy*, 116 F.2d 987, 993 (10th Cir. 1941). And, to this end, the reorganization court is required to "balance the conservation of debtors' assets for the benefit of the creditors with the preservation of an ongoing railroad in the public interest" to obtain, if possible, "rehabilitation of the enterprise pursuant to a plan of reorganization." *Matter of Lehigh Valley R. Co.*, 558 F.2d 137, 147 (3rd Cir. 1977). But, in the case before us, [5] the interests of the creditors had been to a sig-

nificant degree subordinated for four and one-half years while the Trustee attempted to develop a workable plan for income-based reorganization of the Rock Island. The plan for a core operation, as finally developed by the Trustee, was found to be infeasible by a court-appointed independent consultant; and, after a hearing at which the creditors and the Federal Railroad Administration (with the apparent acquiescence of the I.C.C.) argued against any core reorganization, the district court ordered total liquidation of the estate.

As a necessary aspect to such a plan, the reorganization court ordered the Trustee to file an application with the I.C.C. to "confirm the abandonment of the Rock Island's total railroad system." As already noted, the I.C.C. advised the court in response to the Trustee's request that "abandonment of the Rock Island is required by the public convenience and necessity," a recommendation endorsed by the United States Department of Transportation at the June 2, 1980, hearing.

Section 1170 of the new Bankruptcy Act, which permits the reorganization court to authorize an abandonment only if such an abandonment is "consistent with the public interest," provides that the trustee must initiate an abandonment application before the I.C.C. 11 U.S.C. § 1170(b) (Supp. III 1979). The Report of the Senate Committee on the Judiciary states the purpose of this provision:

> Subsection (b) permits some participation by the Interstate Commerce Commisssion in the abandonment process. The Commission's role, however, is only advisory. The Commission will represent the public interest, while the trustee and various creditors and equity security holders will represent the interest of those who have invested money in the enterprise. The court will balance the various interests and make an appropriate decision.

S. Rep. No. 95-989, 95th Cong., 2d Sess. 137 (1978). *Accord*, H.R. No. 95-595, 95th Cong. 2d Sess. 423-24 (1978). The statu-

tory scheme thus vests in the I.C.C. the responsibility of representing the public interest, and the district court did not abuse its discretion in approving the I.C.C. recommendation that abandonment was required by the public interest. As we stated in our February 11, 1981, order affirming liquidation of the Rock Island, the reorganization court has been sensitive to the public interest throughout the six-year history of the Rock Island reorganization:

> The RLEA claims that since the creditors have enjoyed the benefits of having a single resolution of all claims, rather than many [6] receiverships, they should bear the burden of serving the public interest by keeping their property invested in rail service. But the history of this case indicates that the reorganization court has duly considered the public interest throughout the reorganization proceedings and has determined that continued operation of the Rock Island no longer serves the public interest considerations required by Section 77.[3]

[3]We held in our February 11, 1981, order that the district court properly exercised its jurisdiction in ordering complete liquidation of the Rock Island. As noted above, the systemwide abandonment order is a critical component of the liquidation plan and flows necessarily from it. As we stated in *Gibbons*:

> [V]iewed as a matter of economics, abandonment represents the final state in the carrier's passage from operation to liquidation. If the financial condition of the railroad becomes so desperate that it is unable to continue operations (and is cashless [to which we now add, and unreorganizable]), the burden may be eased somewhat through the imposition of directed service. Some losses continue, however, at least until the certificate of abandonment issues and the public service obligation terminates. At this critical point, the trustee may begin to liquidate railroad property and realize in an important way the value of the railroad assets. Very significantly, petitioners do not argue here that a condition of cashlessness, no matter how severe or disabling, would in and of itself authorize a railroad to commence the liquidation of its property. It goes without saying that the Rock Island, although cashless and unable to provide service through its own efforts [and unreorganizable] had no authority to proceed to liquidation. That right accrues only upon the termination of the carrier's public service obligation

(Footnote continued on following page.)

RLEA suggests that the district court failed to properly consider the public interest because it did not adequately [7] provide in the abandonment order for measures to assure that Rock Island lines would be sold to provide for continued rail usage instead of being dismantled and sold as scrap. But the reorganization court, in accordance with the recommendation of the I.C.C., directed the Trustee not to scrap or otherwise dispose of some 2,807 miles of track for a period of 180 days following the June 2, 1980, abandonment order. This period was subsequently extended by an additional four months. We do not believe the court abused its discretion in declining to prohibit for a longer period the dismantling of these specified Rock Island properties or in failing to place more track under similar restrictions.[4]

(Footnote continued from preceding page.)

> through the issuance of a certificate of abandonment by the ICC [or, here through the authorization of abandonment by the reorganization court pursuant to § 17(a) of the MRRA].

Gibbons v. Chicago, Rock Island and Pacific R. Co., supra, slip op. at [15-16].

[4]By order 297 entered December 1, 1980, the reorganization court directed:

> 1. That William M. Gibbons, the Trustee herein, be and he is hereby directed, for the period up to and including March 31, 1981 not to scrap, dismantle or otherwise dispose of those rail properties owned by the estate for which he has received expressions of interest, offers to purchase, or is negotiating for sale or lease to parties or entities for continued rail use.
>
> 2. That until the Court's further order, all persons, firms or entities are restrained from physically or otherwise interfering with, or in any manner whatsoever disturbing or affecting the rail properties or rail interest owned by the estate and whose abandonment has been confirmed by this Court's previous orders.

Paragraph 2 of this order has not been altered or amended by the reorganization court, and the trustee informs us that he advised the reorganization court on March 31, 1981, that no dismantling would take place without prior notice to the court. The reorganization court is thus able to continue to consider the public interest in continued rail operations as the liquidation of the Rock Island proceeds.

C. Labor Protection

Appellant argues that the district court, in authorizing systemwide abandonment, failed to provide for payment of labor protection in accordance with § 17(a) of the MRRA, which provides in relevant part:

> In authorizing any abandonment pursuant to this section, the court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under section 11347 of title 49.

45 U.S.C. § 915(a) (Supp. III 1979).

[8] RLEA argues that since the labor protection obligation set forth in § 17(a) applies to "any abandonment," the district court was required to provide such protection in authorizing systemwide abandonment of the Rock Island. RLEA's position is certainly reflected in the language of the statute. But it is contrary to what seems so clearly to be the intent of Congress in enacting § 17a. Section 17(a) was designed to expedite abandonment procedures for a railroad in reorganization by empowering § 77 courts to approve abandonments, a power that had been previously vested in the I.C.C.[5] However, as stated in the Conference Report accompanying the MRRA, § 17a was *not* intended to work a "change in existing law as it affects employee protection." H.R. Conf. Rep. No. [95-595], 96th Cong., lst Sess. 27 (1979), and the existing law regarding labor protection includes the long established I.C.C. practice of denying labor protection in total abandonments.

Before enactment of § 17(a), approval by the I.C.C. in the form of a certificate authorizing abandonment was required before a

[5]Section 17(a) applies to cases commenced under § 77 prior to enactment of the Bankruptcy Reform Act of 1978; 11 U.S.C. § 1170 (Supp. III 1979) transferred authority to authorize abandonments from the I.C.C. to the reorganization court for reorganizations commenced after enactment of the new Bankruptcy Act.

railroad in reorganization under § 77 could abandon a line of track. 49 U.S.C. § 1a(1) (1976). Each certificate of abandonment was required by § 1a to include "provisions for the protection of the interests of employees at least as beneficial to such interests as provisions established pursuant to section 5(2)(f) of this title and pursuant to section 565 of title 45." 49 U.S.C. § 1a(4) (1976).[4]

[9] This provision was recodified in the revised Interstate Commerce Act of 1978, without substantive change, as 49 U.S.C. § 10903(b)(2) (Supp. III 1979). Section 10903(b)(2) reads [as] follows:

> On approval, the Commission shall issue to the rail carrier a certificate describing the abandonment or discontinuance approved by the Commission. Each certificate shall also contain provisions to protect the interests of employees. The provisions shall be at least as beneficial to those interests as the provisions established under section 11347 of this title [formerly § 5(2)(f)] and section 565(b) of title 45.

49 U.S.C. § 10903(b)(2) (Supp. III 1979).

Although both § 1a and § 10903(b)(2) on their face require labor protection to be provided in connection with "each certificate" authorizing abandonment, it had long been the policy of the I.C.C. to deny labor protection in systemwide abandonments. *See, e.g., Bush Terminal R. Co. Entire Line Abandonment*, 342

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[4] The sections cross-referenced in § 1a(4) quantified the protection to be paid to employees displaced as the result of a merger or consolidation of rail carriers, 49 U.S.C. § 5(2)(f) (1976), or as the result of a discontinuance of intercity rail passenger service, 45 U.S.C. § 565 (1976). Those provisions quantified the level of protection by requiring the payment of displacement or dismissal allowances to affected employees equivalent to their wage level prior to the consolidation or discontinuance, adjusted to reflect subsequent wage increases, for a period of six years. *See, e.g., New York Dock Railway v. United States*, 609 F.2d 83 (2d Cir. 1979), *aff'g* 360 I.C.C. 60 (consolidation of two rail carriers); *Oregon Short Line Railroad - Abandonment (Goshen)*, 360 I.C.C. 666 (1980) (partial abandonment).

I.C.C. 34, 51 (1971); *Rutland R. Corp. Abandonment*, 317 I.C.C. 393 (1962), *aff'd sub nom., Brotherhood of Locomotive Engineers v. United States*, 217 F. Supp. 98 (N.D. Ohio 1963). And, when Congress recodified § 1a in § 10903(b)(2) of the revised Act, it approved this policy of the I.C.C., stating that it acted

> without intention to change the policy and practice of the Commision in connection with certificates involving total termination of service by a railroad company.

S. Rep. No. 94-499, 94th Cong. 2d Sess. 218 (1976). We are persuaded that, in the enactment of § 17(a), the applicability of this body of law was similarly preserved. *See* H.R. Conf. Rep. No. 96-583, 96th Cong. 1st Sess. 27 (1979) (quoted *supra*).

The body of law thus preserved by Congress in § 17(a) is described by the I.C.C. in its abandonment report in this case. That report reads in pertinent part as follows:

> Employee Protection. RLEA urges that we recommend employee protection at a level greater than required by New York Dock Ry.—Control—Brooklyn Eastern Dist., 360 I.C.C. 60 (1979). *New York Dock* protection is apparently mandated by section 17(a) of the MRRA. However, under that section the duty to impose employee protection rests squarely with the bankruptcy court. We will make no recommendation, but will point out certain options that the Court has.
>
> [10] The *New York Dock* conditions can be imposed on the Rock Island. However, another viable option is not to impose any form of labor protection. In past instances where entire rail systems have been abandoned and no company would reap the benefits of the abandonment, we have found the imposition of employee protective conditions not to be warranted. *See, Wellsville, Addision & Galeton R. Corp.—Abandonment*, 354 I.C.C. 744, 746 (1978).

In the recent case of *Oregon Short Line Railroad—Abandonment (Goshen)*, 360 I.C.C. 666, 667 (1980), the I.C.C. for the first

time imposed *New York Dock* conditions on a partial abandonment. The Commission expressly recognized the distinction between partial and total abandonments, however, and stated that its decision to impose such labor protective conditions would apply "on all rail abandonment proceedings, except for entire line abandonment." *See also New York Susquehanna & Western Railroad Co.*, 504 F. Supp. 851 (D.N.J. 1980).[7]

In sum, we believe that Congress intended a perpetuation of past practice that labor protection requirements were not applicable to abandonments of whole railroads leaving no rail carrier affiliates still operating. The district court therefore properly declined to provide labor protection in connection with the total abandonment of the Rock Island.

[11] **II.**

By an agreement dated June 21, 1978, the Trustee agreed to sell approximately 1,000 miles of track running from Santa Rosa, New Mexico to St. Louis, Missouri, via Kansas City, Missouri to the Southern Pacific Transportation Company ("SP")[8] for approximately $57 million. The reorganization court authorized

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[7]The policy considerations underlying this distinction were set forth in *Northampton & Bath Railroad Co. Abandonment*, 354 I.C.C. 784, 785-[86] (1980):

> After the entire line of a railroad is abandoned no operating carrier remains to enjoy the benefits of the abandonment or pay the cost of employee protection. The Commission has generally refused to impose employee protective conditions which would in effect, require continued operations for the benefit of employees or further consumption of a failed railroad's properties for payment of employee's benefits after operations cease. The conditions imposed by the review board, those developed in *Oregon Short Line*, are not appropriate for an entire line abandonment where the abandoning railroad has no rail carrier affiliate which continue[s] operations similar to its own.

[8]SP assigned its rights under the agreement to its affiliate, SSW, on November 27, 1978.

the Trustee to seek approval of this sale from the I.C.C. and, after 99 days of hearings in which RLEA participated, the I.C.C. approved the proposed transaction in a decision dated June 6, 1980. On July 31, 1980, the reorganization court, after a hearing, approved entry of the sale.

On March 22, 1980, the Trustee agreed to sell approximately 38 miles of line between Haskell and Hot Springs, Arkansas, to Mo-Pac for approximately $2 million.* On May 8, 1980, the reorganization court preliminarily approved the sale and authorized the Trustee to seek I.C.C. approval. On July 14, 1980, the I.C.C. rendered its decision approving the transaction. The district court approved the sale on July 21, 1980, and denied RLEA's motion for reconsideration on July 31, 1980.

On appeal, RLEA challenges the sufficiency and scope of the labor protection provided in connection with the SSW and Mo-Pac transactions. RLEA did not obtain a stay of the July 21, 1980 and July 31, 1980 orders, however, and its appeals are therefore moot by virtue of Bankruptcy Rule 8-703(a)(6), which describes the effect of an appeal from an unstayed order in reorganization cases:

> Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith holder shall not be affected by the reversal or modification of such order on appeal, whether or not the purchaser or holder knows of the pendency of the appeal.

[12] In *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, (Appeal of Montana Dept. of Agriculture, et al.), No. 80-

*The agreement provides in part that:

> MoPac and Rock Island shall each have the right in its sole discretion to terminate this agreement if any court, agency, or any other governmental authority with jurisdiction over this transaction shall order any material changes in this agreement or otherwise impose any material requirements on MoPac or Rock Island as a condition to any necessary approval.

1745 (7th Cir. February 13, 1981), this court applied Rule 8-703(a)(6), holding that the State of Montana's appeal from the Milwaukee reorganization court's approval of the sale of certain abandoned property was moot for failure to obtain a stay. RLEA attempts to distinguish the *Montana* case on the ground that SSW and Mo-Pac, unlike the purchaser in *Montana*, were not "good faith purchasers" within the meaning of Rule 8-703(a)(6) because they were "directly involved in the dispute before the reorganization court." Appellant's reply brief at 22. But there are no allegations of dishonesty, fraud, or unfair dealing in the cases before us, and it appears that SSW and Mo-Pac paid reasonable value for the purchase of the abandoned properties. We cannot accept the argument that Mo-Pac and SSW are not good faith purchasers simply because they were interested parties.

RLEA also argues that, since it was not challenging the *concept* of the Mo-Pac and SSW sales, but rather only the *terms* under which the Trustee agreed to sell to Mo-Pac and SSW and the terms under which Mo-Pac agreed to purchase, it did not stand any reasonable chance of success in obtaining a stay of the reorganization court's orders. Since RLEA did not even attempt to seek a stay, however, this argument is entirely speculative. Moreover, since the provision of labor protection is an aspect of the reorganization court's orders approving the sales, we do not agree that RLEA (which presumably had standing to appeal from these orders) could not reasonably have sought a stay of the orders pending appeal.

RLEA also argues that Rule 8-703(a)(6) does not moot these appeals because the relief it seeks would not "affect" the sales within the meaning of the rule. However, the reorganization court's orders approving the sales defined the labor protection obligations that were to be required in connection with the sale. If this court were to reverse these orders and require that future approval of the sale agreements be conditioned on imposition of the

potentially substantial additional labor protection obligations urged by RLEA, the Trustee might well be required to attempt to unwind these transactions, since they might not be in the best interest of the estate if they were conditioned on substantial additional labor protection obligations. Such an *ex post facto* revision of the economic burdens of the sales (and the corresponding need to unwind the transactions) would frustrate Rule 8-703(a)(6)'s policy of insuring the finality of sales to "good faith holders."

We therefore dismiss RLEA's appeals from the orders approving the sales to Mo-Pac and SSW as moot. With respect to the appeal from the systemwide abandonment order of June 2, 1980, we affirm.

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Nos. 80-415 and 80-1239

In the Supreme Court of the United States

OCTOBER TERM, 1980

RAILWAY LABOR EXECUTIVES' ASSOCIATION, APPELLANT

v.

WILLIAM M. GIBBONS, TRUSTEE, ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL APPELLEES

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QUESTION PRESENTED

Whether the employee protection provisions of the Rock Island Railroad Transition and Employee Assistance Act, Pub. L. No. 96-254, 94 Stat. 399, as amended by the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, impose an unconstitutional taking of property in violation of the Just Compensation Clause of the Fifth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

Nos. 80-415 and 80-1239

RAILWAY LABOR EXECUTIVES' ASSOCIATION, APPELLANT

v.

WILLIAM M. GIBBONS, TRUSTEE, ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL APPELLEES

OPINIONS BELOW

The order of the court of appeals (J.S. App. 1a-2a)[1] is not reported. The district court's oral opinion (J.S. App. 15a-22a) and order (J.S. App. 13a-14a) of June 9, 1980, and its oral opinion (J.S. App. 23a-30a) of June 20, 1980, denying a motion for reconsideration, are not reported. The district court's orders of October 15, 1980 (J.S. App. 3a-6a), and October 16, 1980 (J.S. App. 7a), are not reported.

JURISDICTION

The district court's order appealed in No. 80-415 was entered on June 9, 1980. The notice of appeal was filed on June 11, 1980 (80-415 J.S. App. 23a), and the appeal was docketed on September 15, 1980. The judgment of the court of appeals appealed in No. 80-1239 (J.S. App. 31a-32a) was entered on December 16, 1980. The notice of appeal (J.S. App. 33a) was filed on December 19,

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[1] "J.S. App." refers to the Appendix to the Jurisdictional Statement in No. 80-1239.

1980, and the appeal was docketed on January 21, 1981. The jurisdiction of this Court is invoked in both cases under 28 U.S.C. 1252. *Parker* v. *Levy*, 417 U.S. 733, 742-743 n.10 (1974).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * nor shall private property be taken for public use, without just compensation.

2. Sections 106 and 110 of the Rock Island Railroad Transition and Employee Assistance Act, Pub. L. No. 96-254, 94 Stat. 401 and 403, as amended by the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, 1959, are set out at pages 35a-41a of the Appendix to the Jurisdictional Statement in No. 80-1239.

STATEMENT

1. In March 1975, after experiencing several years of financial deterioration, the Chicago, Rock Island and Pacific Railroad Company ("Rock Island") petitioned the United States District Court for the Northern District of Illinois for reorganization under Section 77 of the Bankruptcy Act, 11 U.S.C. 205. The Rock Island continued to operate for more than four and a half years under the protection of Section 77. After a strike further damaged its financial posture, however, the Rock Island ceased all operations in September 1979. See J.A. 378a-379a.

In January 1980, the reorganization court directed the Trustee of the Rock Island to prepare a plan for its liquidation, and the Trustee began selling the assets of the railroad (J.A. 239a). On June 2, 1980, the reorganization court authorized the Trustee to abandon the entire Rock Island system and ordered that no employee protection conditions be imposed (J.A. 269a-271a).

On May 30, 1980, a few days before the reorganization court's abandonment order, the President signed into law the Rock Island Railroad Transition and Employee Assistance Act, Pub. L. No. 96-254, 94 Stat. 399 ("the Rock Island Act"). Sections 106 and 110 of the Rock Island Act, 94 Stat. 401 and 403 (J.S. App. 35a-41a), required the Trustee, through the use of high priority federal loans, to provide labor protection benefits of up to $75 million to employees of the Rock Island who might be adversely affected by its cessation of operations. Specifically, Section 106(b) of the Rock Island Act, 94 Stat. 401, ordered the Interstate Commerce Commission to impose a fair and equitable labor protection arrangement within 30 days unless, prior to that time, the railroad and labor organizations representing its employees were able to agree upon a satisfactory arrangement. Section 106(c), 94 Stat. 401, provided that the bankruptcy court should immediately direct the Trustee and the labor organizations to implement the arrangement. Section 106(d), 94 Stat. 401, provided that orders of the Commission or of the bankruptcy court under Sections 106(b) and (c) could not be stayed and that these orders could be reviewed only in the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit was required to rule on any such appeal within 60 days, and its decision would not be subject to further review. Section 106(e)(2), 94 Stat. 402, provided that labor protection claims would be treated as administrative expenses of the Rock Island estate.

Section 110 of the Rock Island Act, 94 Stat. 403, required the Secretary of Transportation to guarantee obligations of the Rock Island for the purpose of providing employee protection under an agreement entered into under Section 106. It further provided that the guaranteed obligations would be treated as an administrative expense of the Rock Island estate and that the United States would incur no liability except

in connection with those obligations. The amount guaranteed by the Secretary, and the liability of the Rock Island under a labor protection agreement, were each limited to $75 million.

2. After the enactment of the Rock Island Act, the National Mediation Board offered its assistance in negotiating an employee protection agreement. The Rock Island Trustee, however, declined to participate in negotiations. See J.A. 147a-148a. On June 5, 1980, the Trustee, the indenture trustees under the mortgages of the Rock Island and representatives of certain creditor interests filed a complaint in the bankruptcy court seeking a judgment declaring the Rock Island Act unconstitutional and enjoining its enforcement. After a hearing on June 9, 1980, the district court entered a preliminary injunction enjoining the Commission, the Trustee, and the Secretary of Transportation from fulfilling their obligations under Sections 106 and 110 of the Rock Island Act (J.S. App. 13a-14a).

The district court explained its reasons for issuing the injunction in an oral statement from the bench (J.S. App. 15a-22a). Although the court suggested that the statute might have other constitutional problems, it based its ruling on the fact that the labor protection provisions constituted an unconstitutional taking of the property rights of the creditors, in violation of the Just Compensation Clause of the Fifth Amendment (*id.* at 17a-19a).[2]

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[2] In addition to challenging the labor protection provisions, the complaint also included challenges to a number of other provisions of the Rock Island Act. The decisions below, however, concern only the labor protection provisions of the Act. Until recently the Trustee and other plaintiffs have not pursued any aspects of the complaint other than the counts relating to labor protection. On July 10, 1981, the plaintiffs filed an amended complaint, the amended portions of which pertain to various Commission orders under Section 122 of the Act, 94 Stat. 409, which empowers the Commission to authorize other carriers to operate temporarily over the tracks and facilities of the Rock Island. By order of July 13, 1981, the court permitted the amended complaint to be filed.

The court noted that the Seventh Circuit would shortly be called upon to decide the constitutional question (*id.* at 18a), but nonetheless concluded that if the Rock Island Act were permitted to go forward, the creditors of the estate would suffer irreparable harm (*id.* at 19a-20a). The court explicitly rejected the Commission's contention that no injunction should be entered until the Commission was given an opportunity to formulate a specific labor protection plan, stating (*id.* at 18a-19a):

> The issues [*sic*] is not whether the I.C.C. can arrive at a labor protection plan which the creditors and the Trustee could live with, even if that plan were to cost the Estate only $1 million. The issue is whether ab initio, the concept of a compelled labor protection plan, paid for out of the Estate, whatever the plan, has any constitutional sanction. We don't have to wait for an I.C.C. determination of the details of the plan to determine that issue.

Accordingly, the court enjoined (i) the Trustee and representatives of affected employees from entering into negotiations respecting a labor protection agreement; (ii) the Commission from considering the imposition of any such agreement; and (iii) the Secretary of Transportation from guaranteeing any loans or obligations of the Rock Island under the Rock Island Act (J.S. App. 13a-14a).[3]

Because the district court had interrupted the procedures established by the Act before a labor protection plan could be devised, an expedited appeal to the Seventh Circuit, as contemplated by Congress, could not be taken.[4] Therefore, RLEA, the United States, and the

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[3] On June 20, 1980, the court denied a motion for reconsideration filed by the Railway Labor Executives' Association ("RLEA"), the United States and the Commission, again explaining that the labor protection provisions of the Rock Island Act constituted an unconstitutional taking (J.S. App. 26a-27a).

[4] The judicial review provisions of Section 106(d) covered appeals of orders entered under Sections 106(b) and (c), which did not come into play until a labor protection plan was devised.

Commission filed notices of appeal to this Court pursuant to 28 U.S.C. 1252. RLEA, supported by the United States and the Commission, sought a stay of the preliminary injunction from Justice Stevens in order to allow the procedures mandated by the Rock Island Act to go forward pending a determination of its constitutionality. On June 28, 1980, Justice Stevens denied the application (J.S. App. 43a-47a; 448 U.S. 1301). Acknowledging that "[n]ecessarily, my views are tentative," Justice Stevens stated that the district court was "probably correct" in finding that the labor protection provisions of the Rock Island Act would constitute a taking of the estate's property (J.S. App. 47a). Justice Stevens rejected the argument that the estate would suffer no irreparable harm if labor protection payments were made and the Rock Island Act were later determined to constitute a taking, because he doubted that the creditors would have a remedy against the government by a suit in the Court of Claims under the Tucker Act, 28 U.S.C. 1491: "[W]hile the Solicitor General suggests that a Tucker Act remedy *may* exist in the event of an unconstitutional taking, * * * it is obvious that his suggestion is equivocal" (J.S. App. 47a). The application for a stay was then resubmitted to the full Court, which denied the request on July 2, 1980, by a 5-3 vote. 448 U.S. 909. Thereafter, RLEA docketed its appeal as No. 80-415.

3. In response to the district court's injunction, Congress passed Section 701 of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1959, which amended the Rock Island Act in a number of significant respects.[5] Section 701 re-enacted the provisions of Section 106 requiring the Trustee to negotiate a labor protection agreement. However, the time for the parties to negotiate the agreement was shortened from 10 to five days, and the time for the Commission to impose a

[5] The relevant provisions of the Rock Island Act, both before and after amendment by the Staggers Rail Act, are set forth at J.S. App. 35a-42a.

fair and equitable arrangement, in the absence of an agreement, was shortened from 30 to 15 days.

The judicial review provisions of Section 106(d) were also changed. The amended section no longer includes the prohibition against staying orders of the Commission or the bankruptcy court issued under the Rock Island Act or the bar to further review of the Seventh Circuit's decision. Moreover, the Staggers Rail Act added a new Section 124 of the Rock Island Act (94 Stat. 1959). This section closed the jurisdictional loophole that had prevented the district court's decision from being appealed expeditiously to the Seventh Circuit by providing that "[n]otwithstanding any other provision of law, any appeal from * * * any decision of the bankruptcy court with respect to the constitutionality of any provision of [the amended Rock Island] Act * * *" must be taken to the Seventh Circuit, sitting en banc, and must be decided within 60 days.

The Staggers Rail Act also added language clarifying Congress' intention that monies paid out by the estate could be recovered from the United States in the event that the employee protection provisions of the Rock Island Act subsequently were held to be a taking. Section 110(e) of the Rock Island Act was amended to make explicit that it was a limitation of the liability of the United States only with respect to the employees of the railroad, not to the estate. And Section 124(c) was added to the Rock Island Act, providing:

> Nothing in this Act * * * shall limit the right of any person to commence an action in the United States Court of Claims under section 1491 of title 28, United States Code (commonly referred to as the Tucker Act).

4. On October 6, 1980, in light of the new statute, RLEA and the United States, supported by the Commission, moved the district court to vacate its injunction of

June 9, 1980.[6] The movants argued that passage of the Staggers Rail Act effectively mooted the June 9 injunction because the injunction applied to a statute no longer in existence and had no application to the re-enacted but nevertheless new and distinct obligations concerning labor protection that the Staggers Rail Act amendments imposed on the Commission and the other parties. Moreover, the movants argued that the Staggers Rail Act amendments eliminated the features of the original Rock Island Act that the district court had concluded would lead to irreparable injury unless enjoined pending appeal—particularly by expressly providing that a Tucker Act remedy is available if the labor protection provisions are ultimately found to effect a taking of property—and therefore that the procedures established in the Rock Island Act, as amended by the Staggers Rail Act, should be permitted to go forward.

On October 15, 1980, the district court denied the motion to vacate and issued a new injunction preventing the Commission, the Trustee and the Secretary of Transportation from taking any action respecting the labor protection provisions of the "Rock Island Act as amended and re-enacted by the Staggers Rail Act" (J.S. App. 3a-6a). The Court held that the "Staggers Rail Act does not cure the defects found in the Rock Island Act" (*id.* at 5a) and that "[t]he Rock Island Act as amended and re-enacted by the Staggers Rail Act effects an unconstitutional taking of private property" (*id.* at 6a). The Staggers Rail Act did not eliminate the likelihood of irreparable injury to the estate, in the court's view, because (*id.* at 5a):

> The imposition of a $75,000,000 uncertainty on the estate will totally halt the liquidation for the long period consumed by the appellate process, with irreparable injury to the already long-suffering cred-

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[6] Although the Staggers Rail Act did not become law until October 14, 1980, the district court held a hearing on the motion on October 7, 1980 (see J.S. App. 9a-11a), in the expectation that the President would sign the bill.

itors. Further, the whole liquidation plan will be distorted by the brooding omnipresence of a potential liability representing a significant percentage of the total assets.

The court's order did not discuss the effect of the express provision of a Tucker Act remedy on the irreparable harm question. On October 16, 1980, the court sua sponte entered an order (J.S. App. 7a) amending its order of the previous day by changing the phrase "the court orders the issuance of a preliminary injunction," which appears twice, to "the court orders the continuance of the preliminary injunction."

RLEA, the United States and the Interstate Commerce Commission appealed the order granting the preliminary injunction to the Seventh Circuit sitting en banc, pursuant to Section 124(a) of the amended Rock Island Act (J.S. App. 41a-42a).[7] Relying on the Staggers Rail Act amendments, the court of appeals unanimously denied a motion filed by the private appellees to dismiss the appeal for lack of jurisdiction in light of the pending appeal to this Court in No. 80-415 (J.S. App. 2a). On the merits, the court affirmed without opinion by an equally divided vote (*ibid.*).[8] RLEA then took an appeal to this Court, docketed as No. 80-1239.

On April 27, 1981, this Court noted probable jurisdiction in No. 80-1239 and consolidated it with No. 80-415, while postponing consideration of the question of jurisdiction in the latter appeal until the hearing on the merits.[9]

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[7] While this appeal was pending in the Seventh Circuit, the private appellees filed a petition for a writ of certiorari before judgment. *Gibbons* v. *Railway Labor Executives' Ass'n*, No. 80-704 (filed Oct. 30, 1980).

[8] Chief Judge Fairchild and Judges Sprecher and Cudahy voted to reverse. Judges Swygert, Bauer and Wood voted to affirm. Judges Cummings and Pell did not participate.

[9] In our response to the jurisdictional statement in No. 80-415, the government urged that the June 9, 1980, injunction be vacated as moot in light of the passage of the Staggers Rail Act and the

SUMMARY OF ARGUMENT

A.

1. Although the district court titled its orders preliminary injunctions, the question whether the Rock Island Act effects a taking of property within the meaning of the Just Compensation Clause is properly before this Court. The injunctions below rested solely on a question of law; no trial on the merits was necessary to clarify the issues and none was contemplated. The court explicitly made a final determination that the labor protection provisions of the Rock Island Act are unconstitutional (see J.S. App. 6a, 10a-11a, 17a, 29a). Accordingly, its orders were effectively permanent injunctions and should be treated as such. Cf. *Sampson* v. *Murray*, 415 U.S. 61, 85-87 (1974).

A decision by this Court that considered only the issue whether the district court abused its discretion in issuing the preliminary injunctions and then remanded for a trial on the merits would not promote the efficient administration of justice. On remand, the district court would certainly enter a permanent injunction, beginning the appellate process anew and causing further delay—delay that would harm both the Rock Island employees and the orderly liquidation of the estate. Moreover, a remand would frustrate the express intent of both Congress and the district court to facilitate a rapid appellate resolution of the constitutionality of the Act (see J.S. App. 18a, 20a, 27a-28a). In these circumstances, it is well established that this Court is free to decide the underlying merits even if the case is technically at the preliminary injunction stage. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 584-585 (1952).

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subsequent judicial proceedings. In our view, any issues presented in No. 80-415 that are not identical to issues presented in No. 80-1239 are moot. Accordingly, this brief will address only those issues presented in No. 80-1239.

2. Although the Tucker Act would provide the private appellees with an adequate remedy at law if the Rock Island Act were held to constitute a taking, this Court nevertheless should resolve the taking question in this case. In contrast to those cases where the Court has declined to decide the taking issue because it can be resolved in the Court of Claims, the taking issue here will never be more ripe for review. It presents a purely legal question that will not be illuminated by further developments, and it has been fully briefed by the parties.

Moreover, when a governmental regulation adjusting the burdens of economic life between private parties is held to be a taking, Congress should ordinarily be given the opportunity, to the extent possible, to choose between rescinding the regulation or paying just compensation. See *San Diego Gas & Electric Co.* v. *City of San Diego*, No. 79-678 (Mar. 24, 1981), slip op. 22-23 (Brennan, J., dissenting). This consideration should be accorded particular weight here in light of the legislative background. In order to facilitate immediate implementation of the labor protection program, Congress clearly manifested its willingness to assume responsibility for payments made pending judicial review if they were ultimately held to be a taking. But Congress also provided for expedited appellate review so that questions of the constitutionality of the Act, specifically the taking question, would be resolved as quickly as possible. See H.R. Rep. No. 96-839, 96th Cong., 2d Sess. 22-23 (1980). Under these special circumstances, it is appropriate for the Court to decide the taking issue at this stage, thus giving Congress the option to rescind the regulation if it wishes to do so. See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 149-150 n.36 (1974).

B.

This Court has identified certain general principles that serve as guidelines in considering whether a valid exercise of the government's regulatory power rises to the level of a taking that requires just compensation. A

finding that a regulation constitutes a taking, which will be made only in unusual circumstances, depends on "the character of the governmental action" and "[t]he economic impact of the regulation." *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978).

The Rock Island Act is a valid exercise of the government's regulatory power. The labor protection provisions were passed in response to specific congressional findings that the provisions were necessary to preserve uninterrupted rail service on the Rock Island lines and to provide for an orderly transition of those lines. Section 102, 94 Stat. 399 (to be codified at 45 U.S.C. 1001). This Court has recognized that these are important public interest concerns, which the government is entitled to pursue by means of the imposition of labor protection. *United States* v. *Lowden*, 308 U.S. 225 (1939).

The nature of the government action does not indicate that the regulation should be held to be a taking. There is no physical invasion by the government nor any direct benefit to the government in its entreprenurial capacity. Rather, the Act simply adjusts "the benefits and burdens of economic life." *Penn Central Transportation Co.* v. *New York City*, *supra*, 438 U.S. at 124.

Nor does the economic impact of the regulation here indicate a taking. A critical factor in this facet of the taking inquiry is the extent to which the Rock Island Act interferes with distinct investment-backed expectations. The labor protection provisions of the Act do not interfere with any such expectations; they simply make more certain and quantify an obligation that the investors in the Rock Island reasonably should have foreseen when they entered the railroad business.

It has long been established that a railroad may be required to expend funds to further the public interest, even if the expenditures are not in the railroad's individual interest. A railroad may be required to operate an unprofitable line or even operate its entire system at a loss for a reasonable time while alternatives to abandonment are sought. In this regard, the Commission has had

a longstanding policy of conditioning rail line abandonments on the imposition of specific labor protection conditions. This Court has upheld this policy against a constitutional challenge as an exercise of the Commission's responsibility to protect the public interest in an adequate and efficient transportation system. *ICC* v. *Railway Labor Executives Ass'n*, 315 U.S. 373 (1942); *United States* v. *Lowden*, *supra*. And in 1976 and 1979 Congress enacted legislation adopting this administrative policy.

In the exercise of its discretion, the Commission has generally declined to attach labor protection conditions to whole line abandonments, but this does not mean that the private appellees had a reasonable investment-backed expectation that no labor protection obligation would be imposed on the abandonment of the Rock Island. First, on occasion the Commission has imposed employee protection conditions in cases of complete abandonments. Second, even prior to the passage of the Rock Island Act, the plain language of the Milwaukee Railroad Restructuring Act, 45 U.S.C. (Supp. III) 915(a), appeared to require the imposition of labor protection here, although the reorganization court ultimately read the statute as leaving it discretion to decline to impose labor protection in whole line abandonments. Third, the Commission's prior policy with respect to small abandonments gave no assurance that it would not exercise its discretion to impose labor protection when a major carrier like the Rock Island was abandoning all its lines. Finally, the private appellees obviously had no expectation that the Rock Island would need to be liquidated when they invested in it; thus, even if they recently had reason to hope that no labor protection would be imposed in the event of a liquidation, they made no investments in reliance on that hope.

The fact that the Rock Island has been declared unreorganizable does not convert its labor protection obligation into a taking. In the context of a railroad reorganization, the railroad's labor protection obligation must be balanced against the benefit of a partial abandonment

of losing lines. By the same token, the Rock Island Act conferred certain benefits on the Rock Island, such as facilitating its liquidation and *limiting* its possible labor protection liability, that counterbalance to some extent the burden the statute imposed. Even apart from these benefits, however, the requirement that the estate pay a pre-existing obligation does not constitute a taking merely because the enterprise becomes insolvent.

Investors in the Rock Island have always been aware of their potential obligation to make labor protection payments in the event of an abandonment, if the public interest so demands. The public interest considerations that this Court has identified as justifying the imposition of labor protection—the need to compensate displaced employees and to maintain uninterrupted service over lines being purchased for continued rail use (see *United States* v. *Lowden*, *supra*, 308 U.S. at 240)—are equally present in connection with this liquidation as with a reorganization. Moreover, a rule that allowed labor protection for reorganizations, but not liquidations, would discourage employees from remaining in employment with a railroad that might be subject to liquidation, and it would tend to promote liquidations. Thus, conditioning a rail line abandonment on the provision of labor protection is no more a taking in connection with a liquidation than with a reorganization. In both cases, the obligation is assumed by investors when they enter the railroad business.

ARGUMENT

THE LABOR PROTECTION PROVISIONS OF THE ROCK ISLAND ACT DO NOT VIOLATE THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT

A. The Question Whether The Rock Island Act Effects A Taking Of Property Is Properly Before This Court

1. Because the district court styled its orders in this case as preliminary injunctions, there is a threshold question whether the issue of the constitutionality of the

Rock Island Act is properly before this Court. As a general rule, a reviewing court's inquiry on appeal of a preliminary injunction is limited to whether the district court abused its discretion in issuing the injunction. See *University of Texas* v. *Camenisch*, No. 80-317 (Apr. 29, 1981), slip op. 4; *Brown* v. *Chote*, 411 U.S. 452, 457 (1973). In the special circumstances of this case, however, it is appropriate for this Court to reach the merits of the controversy and rule on the constitutionality of the Rock Island Act.

Although the district court described its orders as preliminary injunctions, it is clear that the orders are in effect permanent injunctions, and they have been so treated by the parties to this litigation. "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *University of Texas* v. *Camenisch*, *supra*, slip op. 4. See generally 7 *Moore's Federal Practice* ¶ 65.04[1], at 65-66 (2d ed. 1980). This was not the purpose of the injunctions entered by the district court. Because the issue in this case involved purely a question of law, no trial on the merits was necessary to resolve it and, accordingly, no steps have ever been taken to hold a trial on the merits even though more than a year has elapsed since the entry of the first injunction.[10]

Rather, the purpose of the injunctions entered below was to preserve the relative positions of the parties pending a final, *appellate* resolution of the constitutionality of the Act. Thus, the district court did make an inquiry into the question of irreparable harm analogous to the inquiry that is ordinarily undertaken in the preliminary injunction context, but this inquiry was directed at the irreparable harm that would be suffered pending *appeal*. On this point, the court concluded that a failure to en-

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[10] To the extent that there was any uncertainty when the first injunction was issued whether a trial on the merits would be held, it was clear when the district court entered its second injunction on October 15, 1980, that no further proceedings in the district court with respect to the labor protection provisions of the complaint were contemplated.

join the operation of the Act would "halt the liquidation for the long period consumed by the appellate process, with irreparable injury to the already long-suffering creditors" (J.S. App. 5a; see also *id.* at 19a, 27a).[11] Indeed, the district court explicitly recognized "the absolute necessity in the present posture of this case for an appellate determination" of the constitutionality of the Act (*id.* at 28a), and it intended its order to facilitate that determination (see *id.* at 18a, 20a, 27a-28a).

Accordingly, the district court made a final determination that the labor protection provisions of the Rock Island Act were unconstitutional (see, *e.g.*, J.S. App. 6a, 10a-11a, 17a, 29a) and, indeed, it found that the specifics of the labor protection plan to be imposed by the Commission could not alter this conclusion (*id.* at 18a-19a). Moreover, the private appellees have always treated the district court's orders as decisions on the merits and have sought in this Court affirmance of those orders on the "basic issue * * * whether the labor protection scheme imposed by the Rock Island Act and reenacted by the Staggers Act is constitutional" (80-1239 Motion to Consolidate and Affirm 2; see also *id.* at 7, 11, 16). Thus, we submit that the orders that are the subject of these appeals should be treated as permanent injunctions, notwithstanding that the district court styled them as preliminary injunctions. Cf. *Sampson* v. *Murray*, 415 U.S. 61, 85-88 (1974).

Even assuming that the district court's orders are treated as preliminary injunctions, it is appropriate for the Court to reach the merits here. To remand this case for consideration of the question of a permanent injunc-

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[11] An inquiry into irreparable harm pending appeal, while technically not relevant to the question of issuing an injunction, was relevant to the question whether the injunction should be stayed pending appeal, which was also before the district court. The court denied appellant's request for such a stay (J.S. App. 21a), as did this Court twice. No. 80-1239, Feb. 23, 1981; 448 U.S. 909 (1980).

tion would serve no purpose other than further to postpone the conclusion of litigation that has already long delayed a program that Congress sought to implement expeditiously. The district court has already made clear its view that the Rock Island Act is unconstitutional, and there can be no doubt that it would enter a permanent injunction against its enforcement, which would begin the appellate process anew. In these circumstances, it would frustrate the interest of efficient judicial administration, as well as the express intent of the district court, for the Court to decline to reach the merits. Cf. *City of Newport* v. *Fact Concerts, Inc.*, No. 80-396 (June 26, 1981), slip op. 8.

It is well established that a reviewing court may reach the merits of a legal question when the district court's view of the law is the basis for a preliminary injunction. See, *e.g.*, *Delaware & Hudson Ry.* v. *United Transportation Union*, 450 F.2d 603, 619-620 (D.C. Cir.), cert. denied, 403 U.S. 911 (1971); *Ring* v. *Spina*, 148 F.2d 647, 650 (2d Cir. 1945); see generally C. Wright & A. Miller, *Federal Practice and Procedure* § 2962, at 636-637 (1973). And this Court in the past has found it appropriate to reach the merits, even of a constitutional question, despite the fact that the district court decided the question at the preliminary injunction stage. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 584-585 (1952); see also *McLucas* v. *DeChamplain*, 421 U.S. 21 (1975).

2. As appellant contends (J.S. 29), the Rock Island Act is constitutional even if it does effect a taking because the Tucker Act, 28 U.S.C. 1491, provides an adequate remedy at law. See, *e.g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, No. 79-1538 (June 15, 1981), slip op. 31 n.40. Accordingly, the district court erred in enjoining the Act as unconstitutional. It does not follow, however, that this Court should decline to decide whether the Rock Island Act effects a taking on the ground that that question can be adjudicated later in the Court of Claims.

In some cases, this Court has declined to decide a taking issue because of the existence of a remedy in the Court of Claims. Those cases, however, involved problems concerning the ripeness of the taking claim that are absent here. In *Dames & Moore* v. *Regan*, No. 80-2078 (July 2, 1981), slip op. 30, all parties agreed that the question whether the suspension of claims constituted a taking was not ripe for review. In *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 94 n.39 (1978), there was substantial doubt whether the circumstances alleged to constitute a taking would ever occur. In *Hurley* v. *Kincaid*, 285 U.S. 95, 103-104 (1932), the Court noted that construction had not yet begun of the project that allegedly would result in a taking by flooding of the plaintiff's land. In the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), the Court distinguished among the Fifth Amendment issues raised, ruling on the question whether stock could constitute just compensation (419 U.S. at 149-150 & n.36), but declining to reach the valuation questions because they depended on various contingencies and a more developed record (419 U.S. at 145-147). In all these cases, either it was uncertain whether the conduct alleged to be a taking would ever occur or the taking inquiry would have been aided by further developments, and the Court therefore had reasons not present here to postpone the taking inquiry. Cf. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, *supra*, slip op. 26-31.

This case stands in sharp contrast to the above line of cases. The taking issue presented here is purely a legal one—whether the imposition of any labor protection obligation on the Rock Island is a taking—and will not benefit from any further factual development. It has been fully briefed in the court of appeals and in this Court. A ruling by this Court that there is no taking would be dispositive of this appeal and would avoid future litigation. Thus, despite the existence of an adequate remedy at law, it is appropriate for the Court to

address the taking issue here as it has done in prior cases. See *Dames & Moore* v. *Regan*, *supra*, slip op. 15-16 n.6; *Andrus* v. *Allard*, 444 U.S. 51, 64-68 (1979).

Moreover, the particular circumstances of this case strongly suggest that the Court should address the taking question. When a governmental regulation adjusting the burdens and benefits of economic life between private parties is held to be a taking, the government ordinarily should be given an opportunity to make a choice whether to rescind the regulation or pay just compensation. See *San Diego Gas & Electric Co.* v. *City of San Diego*, No. 79-678 (Mar. 24, 1981), slip op. 22-23 (Brennan, J., dissenting). The legislative background of this case indicates that this consideration should be given particular weight here. Congress recognized the possibility that the Rock Island Act would be challenged as an "unconstitutional taking," although it stated that it considered the challenge insubstantial. See H.R. Rep. No. 96-839, 96th Cong., 2d Sess. 22-23 (1980). Accordingly, it provided in Section 106(d) of the Rock Island Act for expedited appellate resolution of the taking question by requiring review of the Commission's labor protection plan by the Seventh Circuit within 60 days. *Ibid.* After enforcement of the Rock Island Act was enjoined and a stay pending appeal denied, Congress amended the statute for the specific purpose of alleviating "Justice Stevens['] expressed concern about the availability of [a Tucker Act] remedy where [*sic*] the injunction to be lifted and were the Act subsequently to be held unconstitutional." H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 137 (1980). Congress made explicit its retention of the Tucker Act remedy so that "the benefits and allowances will immediately become available to the qualifying Rock Island employees." *Id.* at 138. In so doing, Congress clearly assumed responsibility to make the appellees whole for interim losses sustained if the Act were later held to be a taking after the injunction was lifted. But Congress also preserved the expedited review procedures of Section 106(d) and

added a new Section 124 to ensure that the Seventh Circuit would rule on the constitutionality of the labor protection plan within 60 days.

Thus, although Congress exposed the United States to an undetermined potential liability for an interim taking, it also established special procedures that might enable it to limit the government's liability by rescinding the Act if the Act were found to effect a taking. In these unusual circumstances, it is clearly appropriate for this Court to decide the taking question and thereby afford Congress the opportunity to rescind the statute, if it chooses to do so. See *Regional Rail Reorganization Act Cases*, *supra*, 419 U.S. at 149-150 n.36.

B. General Principles Under The "Takings" Clause

This Court has repeatedly recognized the impossibility of establishing a broad rule for determining whether a taking has occurred in a particular case; "[t]here is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate." *Andrus* v. *Allard*, 444 U.S. 51, 65 (1979). There are, however, some general principles that serve as a guide in making case-by-case determinations. The typical taking, of course, occurs when a government entity formally condemns a landowner's property and obtains the fee simple pursuant to its power of eminent domain. See, *e.g.*, *Berman* v. *Parker*, 348 U.S. 26 (1954). But in certain limited circumstances, a valid exercise of the government's regulatory power may rise to the level of a taking of private property for which just compensation is required under the Fifth Amendment. In determining whether such government actions constitute takings, this Court has identified two general factors of particular significance: "the character of the governmental action" and "[t]he economic impact of the regulation." *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978).

The first factor, the character of the government action, is assessed by looking at the nature of the interference with the property allegedly taken. Where an interference "can be characterized as a physical invasion by government" (see *United States* v. *Causby*, 328 U.S. 256 (1946)) or as an acquisition of assets by the government acting in its entreprenurial capacity (see *Armstrong* v. *United States*, 364 U.S. 40, 49-50 (1960)), it is more vulnerable to constitutional attack. *Penn Central Transportation Co.* v. *New York City*, *supra*, 438 U.S. at 124, 128, 135. On the other hand, a taking ordinarily should not be found where the obligation "arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* at 124. Cf. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). This is because government regulation, by definition, involves the adjustment of rights for the public good, which necessarily results in some diminution in values incident to property. Government could not function if it were required to compensate property owners for each such regulatory burden; it would then be required to regulate by purchase. See *Andrus* v. *Allard*, *supra*, 444 U.S. at 65; *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 413 (1922).

The second factor, the economic impact of the restriction on the property, necessarily requires consideration of the bundle of rights and expectations that is property. "At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." *Andrus* v. *Allard*, *supra*, 444 U.S. at 65-66; *Penn Central Transportation Co.* v. *New York City*, *supra*, 438 U.S. at 130-131, 135-138. Thus, it is well established that even a substantial diminution in value or deprivation of the most beneficial use of property does not effect a taking. *Id.* at 131; see, *e.g.*, *Hadacheck* v. *Los Angeles*, 239 U.S. 394, 408 (1915). And perhaps the most critical factor in assessing the economic impact of a regulation is the degree to which

it interferes with distinct investment-backed expectations. *Penn Central Transportation Co.* v. *New York City*, *supra*, 438 U.S. at 124. See also *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 83 (1980); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979).

These criteria cannot establish a "set formula" for adjudicating challenges under the Takings Clause; rather, they provide guidelines for identifying those unusual cases where "justice and fairness" require the government to pay compensation for private economic injuries suffered as a result of regulation in the public interest. *Penn Central Transportation Co.* v. *New York City*, *supra*, 438 U.S. at 124. Ultimately, the resolution of each case requires an individual "weighing of private and public interests" (*Agins* v. *City of Tiburon*, 447 U.S. 255, 261 (1980)) to determine whether "the public at large, rather than a single owner, must bear the burden of an exercise of [government] power in the public interest" (*id.* at 260)—a determination that calls "as much for the exercise of judgment as for the application of logic." *Andrus* v. *Allard*, *supra*, 444 U.S. at 65.

C. The Labor Protection Provisions Of The Rock Island Act Do Not Effect A Taking

1. *The Labor Protection Provisions are a Legitimate Exercise of Congress' Regulatory Power that Promotes the Public Interest in Continued Rail Service*

There can be little doubt that enactment of the labor protection provisions of the Rock Island Act is a legitimate exercise of congressional power. The collapse of the Rock Island created a serious crisis in rail service in the Midwest, and Congress enacted the Rock Island Act to deal with the resulting problems. In particular, Congress declared that legislation to establish and provide funding for a labor protection plan was "essential to provide for an orderly transition" of the Rock Island. H.R. Conf. Rep. No. 96-1041, 96th Cong., 2d Sess. 26

(1980). Congress concluded that, without such a plan, service over the Rock Island lines would be disrupted, which would have serious adverse affects on the economy of the Midwest and on the ongoing efforts to sell the lines.[12] Efforts to avoid the detrimental impact of these consequences on interstate commerce unquestionably are within Congress' power under the Commerce Clause.

Moreover, this Court has noted that communities become dependent on railroad service to the extent that it becomes "an integral part of the communal life." *The Minnesota Rate Cases*, 230 U.S. 352, 452 (1913). The existence of railroad service attracts people and investment to a community on the expectation that it will continue. Clearly, Congress has broad authority to protect this public interest by taking steps to preserve uninterrupted rail service. See *In re Valuation Proceedings Under §§ 303(c) & 306 of the Regional Rail Reorganization Act*, 439 F. Supp. 1351, 1371 (Spec. Ct. 1977).

Thus, the labor protection provisions of the Rock Island are a proper exercise of Congress' legislative power to

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[12] Section 102 of the Rock Island Act, 94 Stat. 399 (to be codified at 45 U.S.C. 1001), provides in full:

> Congress hereby finds that—
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> (1) uninterrupted continuation of services over Rock Island lines is dependent on adequate employee protection provisions covering Rock Island Railroad employees who are not hired by other railroads;
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> (2) for those Rock Island Railroad employees not hired by other rail carriers, there is no other practicable means of obtaining funds to meet the necessary costs of such employee protection that are assumed by the Rock Island Railroad;
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> (3) a cessation of necessary operations of the Rock Island Railroad would have serious repercussions on the economies of the States in which such railroad principally operates; and
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> (4) premature cessation of services over lines which are the subject of pending purchase application [*sic*] would result in harm to the shipping public and could imperil continuation of vital commuter service.

protect interstate commerce and the public welfare (see, *e.g.*, *Dayton-Goose Creek Ry.* v. *United States*, 263 U.S. 456, 478-479 (1924)), and the only question here is whether the impact of the regulation is such that the Constitution requires the government to pay compensation. See generally *United States* v. *Lowden*, 308 U.S. 225 (1939).

2. *The Character and Economic Impact of the Government Action Here Does Not Indicate a Taking Because it Does Not Interfere with Any Reasonable Investment-Backed Expectations*

Those aspects of a particular government regulation that have often been cited as indicative of a taking are absent here. This Court has stated that a taking is more likely to be found when a regulation directly benefits the government in its entreprenurial capacity. See *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, No. 79-1033 (Dec. 9, 1980), slip op. 9; *Armstrong* v. *United States*, *supra*, 364 U.S. at 48-49; *United States* v. *Causby*, *supra*, 328 U.S. at 262-263 n.7. See also Sax, *Takings and the Police Power*, 74 Yale L. J. 36, 62-63 (1964). Here, the United States itself derives no direct benefit from the regulation; the payments provided for in the statute are to be made to railroad employees displaced by the collapse of the Rock Island, in order to ensure continued rail service.

A taking is also indicated when there is an actual physical invasion of property by the government. Compare *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962), and *United States* v. *Causby*, *supra*, with *Batten* v. *United States*, 306 F.2d 580 (10th Cir. 1962), cert. denied, 371 U.S. 955 (1963) (compensability of diminution in property value depends on whether aircraft causing harm fly over or only alongside affected property). Clearly, there has been no such physical invasion here since this is not a case that involves real property.

Rather, the government action simply requires the payment by the estate of certain employee benefits. Of course, as the private appellees have argued, payment of these benefits diminishes the value of the estate and hence may reduce the sums eventually recovered by the creditors. But such a diminution in value characterizes almost every regulation; it is no indication that the regulation should be characterized as a taking. See *Pennsylvania Coal Co.* v. *Mahon*, *supra*, 260 U.S. at 413. Thus, in *Dayton-Goose Creek Ry.* v. *United States*, *supra*, 263 U.S. at 484, this Court rejected the claim that the requirement that certain profitable railroads transfer a portion of their profits to the Commission and to less profitable railroads constituted a taking. And in *Usery* v. *Turner Elkhorn Mining Co.*, *supra*, where the Court upheld the constitutionality of the Black Lung Benefits Act of 1972, 30 U.S.C. 901 *et seq.*, which directed coal mine operators to make payments to former employees who suffer from black lung disease, it was not even contended that the employee payments constituted a taking.

In assessing the economic impact of a regulation for the purpose of determining whether it constitutes a taking, the extent to which it interferes with investment-backed expectations is of particular significance. *Penn Central Transportation Co.* v. *New York City*, *supra*, 438 U.S. at 124. Examination of this factor here compels the conclusion that the Rock Island Act does not effect a taking. The employee protection payments required by the Act do not violate any distinct expectation of investors; on the contrary, the Act simply makes more certain and establishes a limitation on, and a procedure for satisfying, a recognized obligation of railroads—employee protection. This is the sort of obligation that investors in the Rock Island should reasonably have anticipated when they invested in the railroad.

The railroad industry is a classic example of a heavily regulated business in which investors accept as a condition of their participation the fact that their private

profit-making interests may sometimes be subordinated to the public interest. See, *e.g.*, *Munn* v. *Illinois*, 94 U.S. 113, 130 (1876); *Chicago, Burlington & Quincy R.R.* v. *Iowa*, 94 U.S. 155, 161 (1876). Specifically, it has long been recognized that a railroad may be required to make various expenditures of funds in the public interest, even if they clearly are not in the railroad's individual interest. In *Atlantic Coast Line R.R.* v. *North Carolina Corporation Commission*, 206 U.S. 1 (1907), for example, this Court ruled that a railroad could be required to run an additional train at a loss in order to aid the public in making connections with another carrier. See also *Atchison, Topeka & Santa Fe Ry.* v. *Public Utilities Commission*, 346 U.S. 346 (1953) (railroad may be forced to pay for improvements from which it derives little or no benefit); *Baltimore & Ohio R.R.* v. *United States*, 345 U.S. 146 (1953) (ICC may impose rates that do not cover expenses on certain items). And in *Dayton-Goose Creek Ry.* v. *United States*, *supra*, this Court held that a railroad may be required to remit to the Commission profits that the Commission deems to be in excess of a reasonable rate of return—even if the profits derive from fair and equitable rates.[13]

When a railroad enters reorganization proceedings because its operation as a whole has become unprofitable, its obligation to the public does not end. As the private appellees have acknowledged (see 80-415 Motion to Affirm 11), "[r]ailroads may be required to continue operations at a loss for a reasonable period and to suffer diminution in their property values to serve legitimate governmental interests in maintaining the national transportation system." See *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry.*, 294 U.S. 648, 671 (1935). The Fifth Amendment, of course,

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[13] See also *ICC* v. *United States ex rel. Los Angeles*, 280 U.S. 52, 64-65 (1929); *Colorado* v. *United States*, 271 U.S. 153, 161-162 (1926); *Erie R.R.* v. *Board of Public Utility Commissioners*, 254 U.S. 394, 409 (1921).

does not permit a railroad to be forced to continue operations at a loss indefinitely when there is no hope of a restoration of the railroad as a profit-making concern. *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396 (1920). But consistent with the Fifth Amendment, a railroad may be ordered to continue operations at a loss while the Commission considers alternatives in the public interest to abandonment, even though this continued operation will erode the creditors' security. *Regional Rail Reorganization Act Cases, supra*, 419 U.S. at 122-123; *New Haven Inclusion Cases*, 399 U.S. 392, 490-492 (1970); *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 611 F.2d 662, 667 (7th Cir. 1979); *In re Valuation Proceedings Under §§ 303(c) & 306 of the Regional Rail Reorganization Act, supra*, 439 F. Supp. at 1371.

Providing certain protections to employees displaced by a railroad's abandonment of service is another example of an expenditure railroads are required to make even though it does not redound to their private benefit. The Commission has had a longstanding policy of imposing labor protection as a condition of its approval of abandonment applications.[14] And Congress itself in 1976 and 1979 enacted legislation requiring the imposition of specific labor protection conditions in rail line abandonments. Railroad Revitalization and Regulatory Reform Act of 1976 ("4R Act"), 49 U.S.C. (Supp. III) 10903 (b)(2) and 11347; Milwaukee Railroad Restructuring Act, 45 U.S.C. (Supp. III) 904(a) and 915(c).

In *United States* v. *Lowden, supra*, this Court rejected a challenge to the Commission's policy of imposing labor protection conditions. In the context of a railroad consolidation and lease, the Court held that mitigation of harm to displaced employees is in the public interest

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[14] Congress originally granted the Commission the authority to impose conditions on abandonments in the Transportation Act of 1920, ch. 91, 41 Stat. 477-478. See 49 U.S.C. (1970 ed.) 1(18), 1(20).

because it protects the orderly and efficient operation of the national railroad system by maintaining good labor relations and employee morale.[15] Rejecting the contention that the imposition of labor protection violated the Fifth Amendment, the Court concluded (308 U.S. at 240):

> Nor do we perceive any basis for saying that there is a denial of due process by a regulation otherwise permissible, which extends to the carrier a privilege relieving it of the costs of performance of its carrier duties, on condition that the savings be applied in part to compensate the loss to employees occasioned by the exercise of the privilege. * * * Moreover we cannot say that this limited and special application of the principle, fully recognized in our cases sustaining workmen's compensation acts, that

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[15] The Court explained (308 U.S. at 233-236; footnote omitted):

> It is thus apparent that the steps involved in carrying out the Congressional policy of railroad consolidation in such manner as to secure the desired economy and efficiency will unavoidably subject railroad labor relations to serious stress and its harsh consequences may so seriously affect employee morale as to require their mitigation both in the interest of the successful prosecution of the Congressional policy of consolidation and of the efficient operation of the industry itself, both of which are of public concern within the meaning of the statute.
>
> One must disregard the entire history of railroad labor relations in the United States to be able to say that the just and reasonable treatment of railroad employees in mitigation of the hardship imposed on them in carrying out the national policy of railway consolidation, has no bearing on the successful prosecution of that policy and no relationship to the maintenance of an adequate and efficient transportation system.
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> * * * * *
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> The now extensive history of legislation regulating the relations of railroad employees and employers plainly evidences the awareness of Congress that just and reasonable treatment of railroad employees is not only an essential aid to the maintenance of a service uninterrupted by labor disputes, but that it promotes efficiency, which suffers through loss of employee morale when the demands of justice are ignored.

> a business may be required to carry the burden of employee wastage incident to its operation infringes due process.

Subsequently, this Court confirmed that "[e]xactly the same considerations of national importance are applicable" in connection with a railroad abandonment as with a consolidation and that the Commission is also authorized to impose labor protection conditions in abandonments. *ICC* v. *Railway Labor Executives Ass'n*, 315 U.S. 373, 378 (1942).

Despite this recognition by all three branches of government that labor protection conditions will ordinarily be imposed on rail line abandonments, the private appellees protest (80-415 Motion to Affirm 16) that the Rock Island Act imposes a "wholly new" and unexpected labor protection obligation on the Rock Island. The basis for this contention is the fact that the Commission has traditionally treated partial and whole line abandonments differently with respect to labor protection. But, to the extent the Commission has drawn such a distinction, it has been solely as an exercise of its administrative discretion. In *ICC* v. *Railway Labor Executives Ass'n*, *supra*, this Court held that the Commission has broad discretion to attach labor protection conditions to abandonments, and it did not imply any restriction on the Commission's power with respect to whole line abandonments. In exercising this mandate, the Commission ordinarily has imposed specific labor protection conditions on partial abandonments;[16] with respect to whole line abandonments, the Commission has determined that the question whether employee protective conditions are warranted depends on the facts of each case. See, *e.g.*, *Tennessee Central Ry. Abandonment*, 333 I.C.C. 443, 454

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[16] For many years, the Commission customarily imposed the "Burlington conditions," which required that employees be protected from the adverse effects of the abandonment for the lesser of four years or the duration of their employment. See *Chicago, Burlington & Quincy R.R. Abandonment*, 257 I.C.C. 700 (1944).

(1968); *East Carolina Ry. Abandonment*, 324 I.C.C. 506, 521 (1964). Although, as a general rule, the Commission has declined to attach labor protection conditions to whole line abandonments (see, *e.g.*, *Wellsville, Addison & Galeton R.R. Abandonment*, 354 I.C.C. 744 (1978)), it has ruled in some cases that such conditions should be imposed.[17]

The existence of this general Commission practice is hardly a basis for asserting that Congress' decision to impose labor protection conditions on the abandonment of the Rock Island interfered with the distinct expectations of the Rock Island investors to the degree that it should be held to be a taking. First, as noted above, on occasion the Commission has included the imposition of labor protection conditions even in cases of complete abandonments. The Commission's prior policy thus gave no assurance that it would not consider labor protection necessary in the special circumstances of the Rock Island abandonment. Those cases in which the Commission has permitted whole line abandonments without labor protection involved smaller carriers and significantly fewer employees than the Rock Island.[18] Thus, the effect of such abandonments on the national transportation policy was comparatively minor; a small number of displaced employees could be expected to be reabsorbed into the

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[17] See *Washington & Old Dominion R.R. Abandonment of Entire Line in Virginia*, 331 I.C.C. 587, 601-603 (1968); *East Carolina Ry. Abandonment*, *supra*, 324 I.C.C. at 520-521; *Seaboard Air Line R.R. Trackage Rights, Atlantic Coast R.R.*, 312 I.C.C. 797, 799-801 (1962).

[18] For example, in *Okmulgee Northern Ry. Abandonment*, 320 I.C.C. 637 (1964), on which the private appellees rely (80-415 Motion to Affirm 15), only five employees were subject to loss of employment. 320 I.C.C. at 645. The Commission qualified its order by stating that the imposition of labor protection provisions in total line abandonments "would not serve, *in most instances*, to strengthen the transportation system * * *" (*ibid.*; emphasis added).

work force and the abandonment of a small carrier would not cause repercussions throughout the industry. Here, by contrast, the failure to provide labor protection in connection with the Rock Island could be expected to have a serious effect on the morale of other employees in the industry who would fear for their own financial security. See *United States* v. *Lowden*, *supra*, 308 U.S. at 236.[19]

Moreover, it cannot be maintained that the passage of the Rock Island Act was a sudden and unexpected imposition of labor protection on a whole line abandonment. On the contrary, it is arguable that the Rock Island was subject to a labor obligation on the abandonment of its lines well before the Rock Island Act was passed. Since 1976, the 4R Act, 49 U.S.C. (Supp. III) 10903(b)(2) and 11347, and later the Milwaukee Railroad Restructuring Act, 45 U.S.C. (Supp. III) 904(a) and 915(a), appeared on their face to make mandatory the imposition of labor protection conditions on whole line abandonments. The Commission itself has noted that "the precise language of Section 1a(4) of the [Interstate Commerce] Act would appear to require imposition of employee protection conditions in all permitted abandonments." *Wellsville, Addison & Galeton R.R. Abandonment*, *supra*, 354 I.C.C. at 745.[20] Based on the legislative history (see S.

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[19] Contrary to appellees' suggestion (80-415 Motion to Affirm 15-16), the Commission did not recommend in its May 23, 1980, report to the reorganization court that its precedents declining to impose labor protection in whole line abandonments should be applied here. Rather, the Commission pointedly refused to make any recommendation and specifically noted that "the entire issue of imposing labor protective conditions may be rendered moot shortly by Congressional action" (80-415 Motion to Affirm App. I-17), which in fact it was by the enactment of the Rock Island Act six days later.

[20] Section 1a(4) of the Interstate Commerce Act, 49 U.S.C. (Supp. III) 10903(b)(2), provides in pertinent part:

> Each certificate [of abandonment] shall also contain provisions to protect the interests of employees. The provisions shall be

Conf. Rep. No. 94-595, 94th Cong., 2d Sess. 218 (1976)), the Commission has taken the position that the 4R Act legislation did not remove its discretion to decline to order labor protection payments, and the reorganization court ultimately adopted an analogous interpretation in this case with respect to the Milwaukee Act (J.A. 270a-271a), but the private appellees had no assurance that the statute would be interpreted in this fashion and there is certainly some question whether the reorganization court's interpretation is correct. See H.R. Rep. No. 96-839, 96th Cong., 2d Sess. 21-23 (1980).[21]

Thus, the "expectation" of the private appellees that allegedly has been frustrated by the Rock Island Act is nothing more than the hope that labor protection conditions would not be imposed upon the abandonment of its lines. Although this hope was perhaps a plausible one, appellees had no reasonable certainty that it would come to fruition and no basis for taking any actions in reliance on it such that Congress' contrary decision that the public interest does require labor protection in the circumstances of this case should be considered a taking. Cf. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972);

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at least as beneficial to those interests as the provisions established under section 11347 of this title and section 565(b) of title 45.

Section 17(a) of the Milwaukee Act, 45 U.S.C. (Supp. III) 915(a), provides in pertinent part:

> In authorizing any abandonment pursuant to this section, the court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under section 11347 of title 49.

[21] Section 17(a) of the Milwaukee Act transfers from the Commission to the reorganization court the power to authorize abandonments, with its attendant requirement that labor protection be imposed, in cases pending under Section 77 of the old Bankruptcy Act, such as the Rock Island reorganization. See 45 U.S.C. (Supp. III) 915(a). In these cases, the Commission acts in an advisory capacity. See 11 U.S.C. (Supp. III) 1170.

Dames & Moore v. *Regan*, *supra*, slip op. 15-16 n.6. Moreover, whatever the reasonableness of the appellees' hope that they would be relieved of any employee protection obligation, that hope is not the type of *investment-backed* expectation to which this Court has referred. When the appellees invested in the Rock Island, they certainly had no expectation that it would be forced to abandon all of its rail operations. Rather, they would have considered much more likely the possibility that at some point in the future *some* rail lines might have to be abandoned, which necessarily would entail the payment of employee protection expenses. Thus, it cannot be said that the appellees invested in the Rock Island on the assumption that they would not be required to make labor protection payments.

The private appellees' taking claim contrasts sharply with those cases where this Court has found an interference with investment-backed expectations that rises to constitutional dimensions. In *Kaiser Aetna* v. *United States*, *supra*, for example, a private company "invested substantial amounts of money in making improvements" to convert a shallow lagoon into a marina. 444 U.S. at 176. The purpose of these improvements, including establishing access from the marina to the ocean, was to enable the company to provide a service for which it would charge a fee. Under these circumstances, this Court held that it would be a taking for the government to require free public access to the marina once it was connected to the ocean; the government's unconditional consent to the dredging of a channel to the ocean created an "expectancy" that the dredging would not cause the marina to lose its character as private property, on which the company relied in making its substantial investment. 444 U.S. at 179. And in *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978), relied on by appellees (80-415 Motion to Affirm 19) although it is not a taking case, the Court struck down as violative of the Contract Clause a Minnesota law that altered established vesting

schedules in a pension plan. The Court found that the statute imposed a "completely unexpected liability" on a company that had "relied heavily, and reasonably, on [a] legitimate contractual expectation" that its employees' pension rights would vest in accordance with the terms of the pension plan. 438 U.S. at 246-247.

Here, by contrast, appellees do not allege that they made any investment in reliance on an expectation that has been defeated by the Rock Island Act. They are seeking to avoid an obligation that they always knew might be imposed upon them, simply on the basis that they had reasonably hoped that the obligation would be avoided. This Court has consistently rejected this type of contention: " '[T]hey invested their capital in a public utility that does owe an obligation to the public. . . . [B]y their entry into a railroad enterprise, [they] assumed the risk that in any depression or any reorganization the interests of the public would be considered as well as theirs.' " *New Haven Inclusion Cases*, *supra*, 399 U.S. at 491-492, quoting *Reconstruction Finance Corp.* v. *Denver & Rio Grande Western R.R.*, 328 U.S. 495, 535-536 (1946).

3. *The Determination that The Rock Island is Unreorganizable Does Not Convert Its Labor Protection Obligation Into a Taking*

ICC v. *Railway Labor Executives Ass'n*, *supra*, and *United States* v. *Lowden*, *supra*, establish beyond dispute that labor protection conditions attached to a rail line abandonment do not effect a taking. The district court's contrary conclusion rests solely on the proposition that the principles underlying those cases are inapplicable once a railroad has been declared to be unreorganizable. In response to this contention, it should be noted at the outset that the fact that the Rock Island will not resume rail operations does not mean that the estate has not received any benefits from the Rock Island Act that counterbalance its labor protection obligation to some

extent. Cf. *United States* v. *Lowden*, *supra*, 308 U.S. at 240.

The Rock Island Act was enacted before the district court's abandonment order was entered. At that time, under the plain language of the Milwaukee Act, 45 U.S.C. (Supp. III) 915, the Rock Island was still subject to the potential imposition of labor protection specified in 49 U.S.C. (Supp. III) 11347, which requires at least protection against adverse effects on an employee for the lesser of six years or the period of the individual's employment. See *New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979). The Rock Island Act *limited* this potential obligation and provided a means for funding it, thus helping pave the way for the beginning of the liquidation process by minimizing the delay that would be likely further to erode the value of the estate. Indeed, one of the express purposes of the Act was to avoid disturbing pending purchase applications for Rock Island lines. See Section 102 of the Rock Island Act, 94 Stat. 399 (to be codified at 45 U.S.C. 1001). In its subsequent consideration of the Staggers Rail Act, Congress identified several ways in which it had assisted the Rock Island in preserving the value of its estate, such as by making funds available and expediting agency consideration. H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 138 (1980).[22] The fact that the private appellees do not deem these benefits of the Act to outweigh the burden of the labor protection provisions does not convert

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[22] The Conference Report noted:

> [T]he conferees believe the Rock Island estate has benefitted from the Rock Island Transition Act by the reduction in its employee protection liability and through the Congressionally-supported March 4, 1980, agreement, the ability to lease its facilities and the use of funds to purchase its facilities, thus preserving its value as a going concern, and the expeditious consideration of Rock Island transactions at the Commission.

H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 138 (1980). See also H.R. Rep. No. 96-839, 96th Cong., 2d Sess. 22 (1980).

the Act into a taking. See *Penn Central Transportation Co.* v. *New York City*, *supra*, 438 U.S. at 135.

In any event, apart from any benefit to the estate from the Rock Island Act, it is clear that the requirement that the estate pay a pre-existing obligation cannot constitute a taking. *Brooks-Scanlon Co.* v. *Railroad Commission*, *supra*, establishes that a railroad need not continue to operate at a loss indefinitely once it is determined that the railroad cannot be reorganized on a profit-making basis.[23] But to say that an unreorganizable railroad may be relieved of the burden of running a losing operation does not mean that it must be relieved of its specific preexisting obligations. It is manifest that if an obligation imposed on an enterprise is properly viewed as a regulation (for example, an obligation to pay for the cleanup of oil spills), it is not converted into a "taking" merely because the enterprise becomes insolvent. Similarly, the Rock Island should not be relieved of its obligation to provide financial assistance to its displaced employees simply because it is going to be liquidated.[24] This obligation merely reflects the service

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[23] This principle is qualified by the rule that an unreorganizable railroad may be required to operate at a loss for some period pending an examination of alternatives to total abandonment. *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, *supra*, 611 F.2d at 667. See page 27, *supra*. The Rock Island has not suffered any of these losses. Prior to the reorganization court's finding in January 1980 that the Rock Island could not be reorganized, the Rock Island had ceased providing service over its lines. The lines were being operated by a directed service carrier, pursuant to 49 U.S.C. (Supp. III) 11125, at the expense of the United States (see J.A. 379a n.3).

[24] Obligations to employees traditionally have been given a high priority in the dissolution of bankrupt railroad estates. Under Section 77(n) of the old Bankruptcy Act, 11 U.S.C. 205(n), personal injury claims of employees were to be treated as operating expenses of the railroad. This provision was unsuccessfully challenged in the courts as effecting a taking without just compensation. See *Thompson* v. *Siratt*, 95 F.2d 214 (8th Cir. 1938); *In re Chicago, Rock Island & Pacific Ry.*, 90 F.2d 312 (7th Cir.), cert. denied, 302 U.S. 717 (1937). See also 11 U.S.C. 104 (wage claims given high priority in bankruptcy proceedings).

these employees gave the railroad when it was an ongoing operation.

The public interest requirements that give rise to a potential labor protection obligation when an investor enters the railroad business do not evaporate when a railroad the size of the Rock Island commences liquidation. The need "to compensate the loss to employees" (*United States* v. *Lowden*, *supra*, 308 U.S. at 240) because of their displacement is equally present when employees are displaced because of a liquidation, rather than a reorganization. Although the Rock Island is not destined to resume rail service, several of its lines are being purchased for continued rail use; thus, maintaining "service uninterrupted by labor disputes" and preventing "loss of employee morale" remain important objectives. See *id.* at 236.[25] Moreover, a rule that provided for employee protection in reorganizations but not in major liquidations would be particularly inimical to the public interest. Work force stability would be endangered because employees would be reluctant to continue working for a carrier in financial difficulties for fear that it would commence liquidation, leaving the employees with no protection against displacement. And, as Congress noted, the failure to impose labor protection requirements in major rail bankruptcies would "promote liquidations, to the detriment of the employees and the public interest." H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 138-139 (1980). In short, the obligation to pay labor protection when the public interest requires is an

[25] This Court has recognized that a railroad remains responsible to the public interest even if it has been declared unreorganizable. In the *New Haven Inclusion Cases*, *supra*, 399 U.S. at 461, the Court observed that "no one here quarrels with the proposition that in the event of a liquidation, New Haven would have been obliged to obtain a certificate from the Commission pursuant to § 1(18) of the Interstate Commerce Act." That section empowers the Commission to attach to the certificate of abandonment conditions necessary for the public convenience, including labor protection.

obligation assumed by railroad investors when they enter the railroad business, and requiring them to honor that obligation in the course of a liquidation does not constitute a taking.

CONCLUSION

The judgment of the court of appeals in No. 80-1239 should be reversed. The order of the district court in No. 80-415 should be vacated as moot.

Respectfully submitted.

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Nos. 80-415 and 80-1239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant,

v.

WILLIAM M. GIBBONS, Trustee, *et al.*,
Appellees.

Consolidated Appeals From The United States District Court For The Northern District of Illinois And From The United States Court Of Appeals For The Seventh Circuit

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REPLY BRIEF FOR APPELLANT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

Nos. 80-415 and 80-1239

RAILWAY LABOR EXECUTIVES' ASSOCIATION,

Appellant,

v.

WILLIAM M. GIBBONS, Trustee, *et al.*,

Appellees.

REPLY BRIEF FOR APPELLANT

On September 26, 1981, appellees William M. Gibbons as Trustee of the Chicago, Rock Island & Pacific Railroad Company; Continental Illinois National Bank and Trust Company of Chicago as Indenture Trustee; the First National Bank of Chicago as Indenture Trustee; and Henry Crown, *et al.*, [hereinafter, "Rock Island Appellees"] filed a brief in opposition to the two consolidated appeals by appellant Railway Labor Executives' Association [hereinafter, "RLEA"]. In their lengthy brief, the Rock Island appellees raised several arguments to which appellant RLEA believes a response should be made. This reply brief is respectfully submitted to address those points.

I. In Asserting That The Notice Of Appeal Filed By RLEA In No. 80-415 Was Dissolved By A Subsequent Motion To Vacate, The Rock Island Appellees Fail To Realize That The Filing Of That Notice Of Appeal Was Governed By 28 U.S.C. § 2101(a) And By The Rules Of This Court Which Were In Effect On June 11, 1980, And Not By The Federal Rules Of Appellate Procedure

After unsuccessfully arguing to the Court of Appeals (J.A. 211a) and to this Court (Sup. Ct. No. 80-704) that RLEA's appeal in No. 80-415 required the appeal from the October 1980 order to be brought

directly to this Court notwithstanding Section 124(a) of the Rock Island Transition and Employees Assistance Act [hereinafter, "RITA"], as amended, 45 U.S.C. § 1018(a), the Rock Island appellees have changed tracks, and now assert that appellant never filed a timely notice of appeal to this Court in No. 80-415. Appellees support their changed position by relying upon Rule 4(a)(4), Fed. R. App. P., to assert that appellant's timely notice of appeal which was filed two (2) days after the issuance of the preliminary injunction of June 9, 1980, was "nullified and dissolved" by a subsequent motion by the United States to vacate the June 9th order. R.I. Appellees' Br. at 2-3. Appellant RLEA respectfully submits that the Rock Island appellees should not have altered their position on the validity of the notice of appeal filed by RLEA in No. 80-415 for their earlier conclusion was correct; RLEA's notice was timely when filed (28 U.S.C. § 2101(a)) and its continued validity was not affected by the Federal Rules of Appellate Procedure since those rules do not govern appeals to this Court.

The preliminary injunction at issue in No. 80-415 was granted on June 9, 1980 (J.A. 160a), but was not entered until June 10, 1980. J.A. 9a-10a. On June 11, 1980, RLEA filed with the District Court a notice of appeal to this Court from that order. J.A. 10a. Nine (9) days after that appeal was noted, the United States asked the District Court to vacate the preliminary injunction (J.A. 10a), and RLEA supported that request. *Id.* On that same day, the District Court denied the government's request. J.A. 183a. RLEA did not file a subsequent notice of appeal, but rather, proceeded to docket its earlier noted appeal.

RLEA appealed to this Court under 28 U.S.C. § 1252, and not to the court of appeals. Consequently, the timeliness of its appeal is to be governed by 28 U.S.C. § 2101(a), and by Rule 11.3 of the Rules of this Court as it existed on June 11, 1980.[1] *See*, Rule 10.1, Rules of the Supreme Court. Rule 11.3, as it read on June 11, 1980, provided that an appeal in a case such as that involved in No. 80-415, "shall be in time when the notice of appeal . . . is filed with the Clerk of the

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[1] On April 14, 1980, this Court adopted various amendments to its rules, including amendments to Rule 11. 48 U.S.L.W. 3663 (1980). However, those amendments were not effective until June 30, 1980. *Id.*

appropriate court within the time allowed by law for taking such appeal and the case is docketed within the time provided" in the Rules. Section 2101(a) of title 28 provided the time for taking such an appeal and stated in pertinent part that: "A direct appeal to the Supreme Court from any decision under section 1252 . . . of this title . . . shall be taken within thirty days after the entry of the interlocutory . . . order . . . ." Even though neither Rule 11.3 (as it existed on June 11, 1980 or as it reads today) nor Section 2101(a) provides that a "notice of appeal filed before the disposition [of a timely motion to vacate] . . . shall have no effect" (Rule 4(a)(4), Fed. R. App. P.), the Rock Island appellees nevertheless assert that the notice of appeal filed by RLEA on June 11, 1980, was nullified by the subsequently filed motion to vacate. RLEA disagrees.

Under both the Federal Rules of Appellate Procedure, and the Rules of this Court prior to 1979, a timely filed motion to alter or to amend a judgment did not nullify an earlier filed notice of appeal; rather, the prior notice of appeal transferred jurisdiction over the case to the appellate court. *See*, 9 MOORE'S FEDERAL PRACTICE. ¶ 203.11 (1980 Ed.). Also, a timely filed motion to alter or to amend a judgment did not disolve actions taken prior to that motion, but subsequent to entry of the judgment; rather, the motion simply "tolled the time to appeal" from the original judgment. *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 177 (1944). Those principles governed RLEA's appeal to this Court in June 1980, and thus, the subsequently filed motion to vacate did not dissolve the earlier notice of appeal by RLEA since the District Court no longer had "jurisdiction" over its order of June 9, 1980. [2]

While it is correct that Rule 4, Fed. R. App. P., was amended in 1979 so as to provide that: "A notice of appeal filed before the disposition [of a timely motion to alter or to amend] . . . shall have no

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[2] Even though on June 20, 1980, the District Court technically lacked jurisdiction over its June 9th order, it was accepted procedure that the District Court should first be asked to reconsider its earlier ruling. If it denied that request, as here, nothing else needed to be done; if it were inclined to grant the request, a request would then have to be made to the appellate court to remand for that purpose. *See*, 9 MOORE'S FEDERAL PRACTICE, *supra*, ¶ 203.11 at pp. 3-48 to 3-50.

effect" (Rule 4(a)(4), Fed. R. App. P.), that amendment does not affect this case for several reasons. First, as stated before, Rule 4(a)(4) does not apply to this case. Second, Rule 11.3 of the Rules of this Court as it existed on June 11, 1980 (and even as it now reads), does not contain a similar provision; moreover, when the rationale behind the 1979 amendments to Rule 4 of the Federal Rules of Appellate Procedure is analyzed, it would be improper to construe Rule 11.3 in a similar vein.

Prior to the 1979 amendments to the Federal Rules of Appellate Procedure, an appellant had to take certain positive steps under Rule 3, Fed. R. App. P., to docket an appeal in a court of appeals. In 1979, however, Rule 3 was amended in part to shift to the courts of appeals control over the early stages of an appeal.[3] The amendments to Rule 3, Fed. R. App. P., have the effect of making the docketing of the appeal a ministerial function of the District Court Clerk. The modifications to Rule 3 had an impact on Rule 4, for the Advisory Committee Note to the 1979 amendments to Rule 4(a), Fed. R. App. P., makes clear that Rule 4(a)(4) and its nullification provision were proposed in part because of the charges to Rule 3 so as to avoid "wasted efforts" from the premature docketing of an appeal which may be obviated by a ruling on a subsequently filed motion to alter the judgment. *See*, 9 MOORE'S FEDERAL PRACTICE, *supra*, ¶ 204.01[4] at pp. 4-9 to 4-10. That same consideration does not apply to an appeal to this Court because the docketing of an appeal is far from a ministerial act, and surely will not be made unless the parties consider that an earlier noted appeal is still alive.

II. By Asserting That The Availability Of A Tucker Act Remedy Does Not Preclude The Enjoining Of The Immediate Implementation Of The Employee Assistance Program Mandated By RITA, The Rock Island Appellees Fail To Acknowledge The Full Impact Of That Remedy Upon Their Claims That RITA Infringes Upon Their Rights Under The Constitution

Although recognizing that Section 124(c) of RITA, as amended, 45 U.S.C. § 1018(c), removes any question as to the availability of a Tucker Act remedy[4] in this case, the Rock Island appellees still argue

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[3] *See*, 9 MOORE'S FEDERAL PRACTICE, *supra*, ¶ 203.01[8].

[4] 28 U.S.C. §§1346(a), 1491.

that the District Court properly enjoined preliminarily the implementation of an Act which Congress has twice declared to be essential to the public interest. Appellees continue to support the injunction in this case because, in their opinion, the Tucker Act "does not provide the Government with blanket authority to violate constitutional rights simply because the injured party may have an action for damages under the Act." R.I. Appellees' Br. at 61. In making that argument, however, appellees fail to recognize the full import of the Tucker Act on the case at bar, for that remedy precludes as a matter of law any finding that the assailed provisions of RITA could effect an *unconstitutional* taking of private property for a public purpose. Moreover, the availability of that remedy effectively eliminates a finding of irreparable harm which is necessary before an Act of Congress can be enjoined on non-"Taking Clause" constitutional grounds as advanced by the Rock Island appellees in their brief to this Court.

The only ground upon which the District Court based its preliminary injunction of October 1980, and, hence, the only ground upon which it can be asserted that the lower court exercised its discretion, was upon its conclusion that the Act, "as amended and re-enacted by the Staggers Rail Act [of 1980, Pub. L. No. 96-448,] effects an unconstitutional taking of private property in violation of the rights" of the Rock Island appellees. J.A. 207a. But that conclusion is erroneous as a matter of law because it is premised upon the mistaken assumption that the Fifth Amendment's Taking Clause [5] requires that property owners be compensated *before* a taking may occur.

This Court has consistently held that there is no such guarantee in the Taking Clause. *E.g., Hurley, v. Kincaid,* 285 U.S. 95, 104 (1932). All that the Taking Clause requies is that there be a "reasonable, certain and adequate provision for obtaining compensation" at the time of the taking (*e.g., Cherokee Nation* v. *Southern Kansas Ry.*, 135 U.S. 641, 659 (1890)), and this Court has consistently held that the Tucker Act provides such an adequate means to obtain compensation. *E.g., Dames & Moore* v. *Regan,* Sup. Ct. No. 80-2078, decided July 2, 1981, slip op. at 30-31; *Regional Rail Reorganization Act*

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[5] The Taking Clause provides as follows: "[N] or shall private property be taken for public use without just compensation."

Cases [hereinafter, "*Rail Act Cases*"], 419 U.S. 102, 125-27 (1974). Consequently, since Congress has made that Act available to the Rock Island appellees, no unconstitutional (*i.e.*, uncompensated) taking can be held to be required by the assailed portions of RITA. And thus, an injunction premised upon the Taking Clause cannot validly be issued to enjoin implementation of the employee protection program in RITA.[6]

Relying upon *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 584-85 (1952), the Rock Island appellees contend that, notwithstanding the Tucker Act, an injunction may be issued to enjoin preliminarily a taking where the property owners will be irreparably harmed by a seizure without advance payment of compensation. R.I. Appellees' Br. at 62-63. Appellant RLEA respectfully submits, however, that appellees' reliance upon *Sawyer* is misplaced, for as this Court explained in rejecting an analogous contention in the *Rail Act Cases*, 419 U.S. at 127 n.16, *Sawyer* is inapposite.

Before the Tucker Act can be found to give a remedy for the taking of private property for public use, the taking of the property must have been Government action; *i.e.*, it must have been authorized. *Rail Act Cases*, 419 U.S. at 127 n.16. Congress obviously has the power to "authorize the taking of private property for public use" (*Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, 343 U.S. at 588), and thus, it is clear that the question of authorization will not be at issue in this case if Sections 106 and 110 of RITA are subsequently held to have effectuated a taking. However, in the *Sawyer* case the question of authorization was very much at issue, and it was for that reason that this Court could not find as a matter of law (as it can in this case) that the Tucker Act satisfied the compensation portion of the Taking Clause. *Rail Act Cases*, 419 U.S. at 127 n.16.

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[6] The Rock Island appellees assert that under RLEA's approach to the Taking Clause, no taking, however onerous, could ever be enjoined so long as Congress did not withdraw the Tucker Act remedy. R.I. Appellees' Br. at 62-65. Appellees' argument, however, ignores the fact that other constitutional guarantees also limit Congress' range of action. Moreover, as explained below, only takings authorized by Congress or by other powers enumerated in the Constitution, are protected by the Tucker Act remedy.

Besides precluding a finding of an unconstitutional taking under the Taking Clause, the availability of a Tucker Act remedy in this case also precludes a finding that the Rock Island appellees can be irreparably harmed, as they assert they will be by an immediate implementation of Sections 106 and 110 of RITA, assuming *arguendo* that those provisions are constitutionally infirm for some non-Taking Clause reason. According to the District Court, the irreparable harm which it found will accrue to the Rock Island appellees if Sections 106 and 110 of RITA are implemented, stems from the fact that the "brooding omnipresence of a potential liability representing a significant percentage of the total assets" will distort any liquidation plan and "will totally halt the liquidation [of the estate] for the long period consumed by the appellate process, with irreparable injury to the already long-suffering creditors." J.A. 207a. A Tucker Act remedy, appellant RLEA respectfully submits, makes that potential harm insufficient to stall and frustrate the will of Congress.[7] Moreover, when the facts of this case are examined, it becomes clear that it is the injunction at bar which is actually harming the Rock Island creditors.[8]

Far from removing the "brooding omnipresence" of a large potential liability, the injunction in this case has actually delayed the resolution of that potential liability. If the Act had been implemented immediately as Congress directed, the taking issue, or any other issue which the Rock Island appellees believed was involved, could have been presented by now to the proper forum for resolution. However, almost a year and-a-half after RITA was enacted, the taking issue in particular is not even ripe for resolution. In the meantime, the District

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[7] As this Court explained in *Hurley* v. *Kincaid*, *supra*, 285 U.S. at 104 n.3:

> Even where the remedy at law is less clear and adequate, where large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a court of equity acts with caution and only upon clear showing that its intervention is necessary in order to prevent irreparable injury. . . .

[8] Appellant RLEA again asserts that the standing of certain appellees to challenge Sections 106 and 110 of RITA is subject to question. *See*, Appellant's Br. at 27 n.13. When it is realized that the present balance sheets of the estate show that the shareholders have a negative balance (J.A. 329a), it becomes unnecessary to examine the impact of RITA on the shareholders.

Court has authorized the Trustee not to file a plan of liquidation until the validity of Sections 106 and 110 of RITA are resolved. R.I. Appellees' Br. at 63 n.29. And, even though the estate has a substantial amount of liquid assets (J.A. 328a), with additional funds being received from the sale of Rock Island assets, the court has authorized the Trustee to defer virtually all administrative debts from the operation period of reorganization until the validity of Sections 106 and 110 of RITA are resolved. Ruling of October 15, 1981 on Petition by RLEA for Immediate Payment of Administrative Expense (Vacation Pay).

There is, however, no need for such continued deferral or delay in formulating a plan of liquidation because the estate can be liquidated now on the assumption that the employee protective provisions of RITA are valid. In the meantime, a Tucker Act claim can be prosecuted to determine the validity of that program. If that suit is eventually successful, a result which appellant submits will not be achieved, the creditors who were not able to be paid from the present assets can then receive their due from the proceeds of any Tucker Act recovery. As this court has explained before, "the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury." *Sampson* v. *Murray*, 415 U.S. 61, 90 (1974). That same reasoning eliminates any claim of irreparable injury to Rock Island creditors in this case.

III. Contrary To The Assertions Of The Rock Island Appellees, RITA Did Not Impose A Retroactive, New Liability Upon The Rock Island Estate Since The Estate Had And Still Has A Preexisting Obligation To Aid Its Employees Survive The Economic Hardships Caused By The Demise Of The Rock Island

Asserting that appellant and the federal appellees are mistaken in arguing that the employee assistance provisions of RITA conferred a benefit upon the estate by limiting a potentially larger obligation to Rock Island employees, the Rock Island appellees insist that the assailed provisions of RITA actually imposed a retroactive and new liability upon the estate. R.I. Appellees' Br. at 28-34. Appellant RLEA respectfully submits that it is the Rock Island appellees who are mistaken on this point for when Congress transferred to the District Court the jurisdiction to authorize the abandonment of Rock Island lines, Congress conditioned that authority by providing that in

authorizing any abandonment under that provision, "the court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under [49 U.S.C. §11347] . . . ." Section 17(a), Milwaukee Railroad Restructuring Act [hereinafter, "MRRA"], 45 U.S.C. § 915(a). That obligation existed when the Rock Island reorganization court declared the debtor to be unreorganizable on January 25, 1980,[9] and it was that obligation which Congress believed it was compromising when it passed Sections 106 and 110 of RITA shortly before the reorganization court authorized the abandonment of the debtor on June 2, 1980.

Almost five years before the current Rock Island was incorporated in 1947, this Court informed the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] that the Commission was in error when it concluded that it did not have the discretion under the abandonment provisions of the Interstate Commerce Act to impose employee protective provisions as a condition of any abandonment authorization. *ICC* v. *Railway Labor Executives' Association*, 315 U.S. 373 (1942). Thereafter, the Commission began to routinely impose employee protective conditions in abandonments as an exercise of its discretion. *E.g.*, *Chicago, B.&Q.R.—Abandonment*, 257 I.C.C. 700 (1944).

However, the ICC soon developed an exception to the routine application of employee protective provisions and it enunciated that policy in *Chicago, Attica & Southern R.—Abandonment*, 261 I.C.C. 646 (1946), where it stated:

> Facts and circumstances in various abandonment proposals presented to us vary widely in the situations involved. These situations fall into general groups, (1) abandonment of entire properties by carriers which are no longer able to continue the struggle for survival because of highway competition or other conditions depriving them of sufficient means of livelihood; (2) partial abandonments by generally unprosperous carriers in the effort to reduce expenses and thereby preserve service to the public on their remaining lines; and (3) abandonment of main

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[9] Appellant RLEA unsuccessfully challenged the decision to liquidate. *In re Chicago, R.I. & P.R.*, 7th Cir. No. 80-1353, decided February 11, 1981, (unpublished) (J.A. 377a), *cert. denied*, Sup. Ct. No. 80-1899 (October 5, 1981).

> lines, branch lines, or parts of lines by carriers, not in *extremis*, where abandonment is warranted and desirable as a benefit to the transportation system, but, in the language of the court, results also in a private benefit for the railroad in the form of savings realized by discontinuing uneconomic service.

261 I.C.C. at 651. On balance, the Commission concluded, employee protection should not be imposed as an exercise of its discretion in groups 1 and 2, but would be imposed routinely in group 3 situations. *Id.* at 652. That policy was further explained in *Okmulgee Northern Ry.—Abandonment*, 320 I.C.C 637, 645 (1964) (emphasis added), in which the Commission stated:

> In our opinion, the imposition of protective conditions in proceedings such as these [entire line abandonment involving seven employees], where a carrier proposes to abandon its entire line of railroad normally is not warranted, and would not serve, *in most instances*, to strengthen the transportation system within the contemplation of the national transportation policy. *A departure from this principle in particular cases must be supported by clear and convincing evidence*. . . .

Prior to 1976, the ICC had further developed the policy it had enunciated in *Chicago, Attica & Southern, supra*, drawing three exceptions to its "entire line abandonment" policy. Two of those exceptions are set forth by the Rock Island appellees at note 17, page 31 of their brief and need not be repeated here. The third exception, however, is not mentioned by those appellees, and it bears materially on the case at bar. All of the entire line abandonment cases cited by the Rock Island appellees involved small railroads employing less than 500 people. *E.g., Rutland Ry.—Abandonment*, 317 I.C.C. 393 (1962) (489 employees), *aff'd, Brotherhood of Locomotive Engineers* v. *United States*, 217 F. Supp. 98 (N.D. Ohio 1963); *Tennessee Central Ry.—Abandonment*, 333 I.C.C. 443 (1968) (334 employees affected). However, in those cases in which the Commission was faced with an application of the *Chicago, Attica & Southern* policy to carriers with large work forces, the ICC declined to follow that practice, and instead concluded that employee protection in some form should be imposed. *Penn Central Transportation Co.—Reorganization*, 347 I.C.C. 45, 92 (1973); *Central R. of N.J.—Abandonment*, 342 I.C.C. 227, 300-02 (1972). Indeed, in the *Penn Central* case the ICC expressly rejected the argument that it should

exercise its discretion so as to permit the "wholesale separation" of employees without adequate compensation. *Penn Central Transp. Co., supra,* 347 I.C.C. at 92.

In 1976, however, Congress amended the abandonment provisions of the Interstate Commerce Act and it added in what is now 49 U.S.C. § 10903(b)(2), the requirements that whenever the Commission authorizes an abandonment it issue a certificate, and that:

> Each such certificate which is issued by the Commission shall contain provisions for the protection of the interest of employees. Such provisions shall be at least as beneficial to such interests as provisions established pursuant to section 5(2)(f) of this Act and pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. 565).

Section 802, Railroad Revitalization and Regulatory Reform Act of 1976 [hereinafter, "4R Act"], Pub. L. No. 94-210. When Congress passed the MRRA in November 1979, and by Section 17(a) of that Act transferred to the Rock Island reorganization court the authority which the ICC had previously enjoyed under 49 U.S.C. § 10903 to authorize abandonments, Congress stated in its Conference Report (H. Rpt. No. 96-583, 96th Cong., 1st Sess. at 27 (1979)) that the "Conference substitute intends to make no change in existing law as it affects employee protection." To effectuate that intent, Congress provided in Sections 17(a) and (b)(1) of that Act that whenever the reorganization court authorized an abandonment (§ 17(a)), or a sale or transfer (§ 17(b)(1)), the court must provide a fair arrangement to protect employees.

Even though there was no express reference to the entire line abandonment doctrine by Congress during its consideration of the MRRA, the Rock Island appellees and four courts which have considered this issue,[10] have all asserted that when the MRRA was

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[10] Two of the courts addressed this issue in the Rock Island case; *In re Chicago, R.I.& P.R.*, N.D. Ill. No. 75 B 2697, Order No. 248, *aff'd*, 7th Cir. Nos. 80-1788, *et al.*, decided October 13, 1981 (unpublished), petition for rehearing pending. Two other courts addressed this issue in the New York, Susquehanna & Western Railroad case; *In re New York, S.& W.R.*, 504 F. Supp. 851 (D.N.J. 1980), *aff'd*, 3rd Cir. Nos. 81-1121 and 81-1929, decided November 16, 1981 (attached hereto as Appendix C). The *Susquehanna* involved a Class III railroad which employed 59 people on January 1, 1980.

enacted, Congress did not intend to require employee protection in an entire line abandonment situation. Appellant respectfully submits that such an interpretation of the MRRA is not only contrary to maxims of statutory construction, but is also factually incorrect insofar as the Rock Island is concerned.

To support their erroneous construction of the MRRA, the Rock Island appellees and the lower courts rely upon a statement in the Conference Report to the 4R Act, H. Rpt. No. 94-781, 94th Cong., 2d Sess. at 218 (1976), which stated in reference to what is now 49 U.S.C. § 10903(b)(2):

> . . . (5) [The Senate bill, followed by the Conference Substitute] required employee protection no less beneficial than that established under section 5(2)(f) of the Interstate Commerce Act and section 405 of the Rail Passenger Service Act but without intention to change the policy and practice of the Commission in connection with certificates involving total termination of service by a railroad company . . . .

The last part of that quote, however, is the first and only reference to the entire line abandonment practice in the 4R Act's legislative history. *See*, 121 Cong. Rec. 38451-52 (December 4, 1975); H. Rpt. No. 94-725, 94th Cong., 1st Sess. at 76 (1975). Moreover, it is contradicted by the clear language of the statute itself. Nevertheless, the Seventh Circuit concluded in the *Rock Island* case, *supra*, n.10, and the Rock Island appellees argue here, that the language in the 4R Act Conference Report created an exception to the mandatory language in Section 17(a) of the MRRA. Appellant RLEA disagrees.

This Court has long indicated that the "starting point" in an interpretation of a statute is the "language employed by Congress." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979); *Andrus* v. *Allard*, 444 U.S. 51, 56 (1979). Where the language of a statute "admits of no exception[,]" it is error for a court to legislate such an exception by judicial construction. *TVA* v. *Hill*, 437 U.S. 153, 173 (1978). But that is exactly what must be done in this case to construe Section 17(a) of the MRRA as giving the Rock Island reorganization court the discretion to not impose employee protection when it authorized the abandonment of the debtor. According to the Seventh Circuit in its *Rock Island* abandonment decision: "RLEA's position [*i.e.*, that employee protection is mandatory] is certainly reflected in the language of the statute. But it is contrary to what seems so clearly to be the intent of

Congress in enacting [Section 17(a) of the MRRA]. . . ." *In re Chicago, R.I. & P.R.*, 7th Cir. Nos. 80-1788, *et al.*, decided October 13, 1981 (unpublished per Circuit Rule 35), slip op. at 8, petition for rehearing pending. The legislative history involving RITA and its Staggers Rail Act amendments shows that the court of appeals' factual statement is incorrect.

When Congress was considering legislation which eventually became RITA, the House Committee on Interstate and Foreign Commerce reported out that legislation in March 1980, and stated:

> During the period of directed service, the bankruptcy court, on January 25, 1980, ordered the Rock Island to be liquidated on the grounds it could not be reorganized. As part of the [liquidation] . . . order, the Rock Island must obtain a certificate of abandonment from the bankruptcy judge *with a fair arrangement for employees* at least as protective of the employees as required under section 11347 of Title 49 of the United States Code.

H. Rpt. No. 96-839, 96th Cong., 2d Sess. at 21 (1980) (emphasis added). The committee's statement was based upon the knowledge that it had earlier in the MRRA required the imposition of employee protection in this case. Moreover, it was premised upon that interpretation of its own intent that Congress enacted the alternative employee protective provisions of RITA, 45 U.S.C. § 1005. *Compare*, 126 Cong. Rec. S5806 (May 22, 1980) (Remarks of Sen. Kassebaum), *with*, H. Rpt. No. 96-839, *supra*, at 21-23.[11] If there were any question as to the intent of Congress in enacting the MRRA to require the imposition of employee protection in this case, that question should have been put to rest by the Conference Report of that same Congress in passing the Staggers Rail Act of 1980, where the conferees stated: "The conferees reiterate that it is the intention of Congress that employee protection be imposed in bankruptcy proceedings involving major rail carriers, for to do otherwise would be to promote liquidations, to the detriment of the employees and the

[11] RLEA acknowledges that subsequent legislative history forms a hazardous basis for devining the intent of Congress, *Andrus* v. *Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980); however, such information is instructive and is controlling, it is submitted, in a case such as this where it explains the intent of Congress *before* the issue arose on June 2, 1980.

public interest." H. Rpt. No. 96-1430, 96th Cong., 2d Sess. at 138-39 (1980).

Apparently recognizing the weakness of their statutory interpretation argument, the Rock Island appellees seek to sustain their construction of Section 17(a) of the MRRA by asserting that this Court's decision in *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396 (1920), and its progeny, compel the conclusion that any imposition of an employee protection requirement on the Rock Island estate affronts the Fifth Amendment guarantees of the Rock Island investors to withdraw their investments from a losing enterprise. R.I. Appellees' Br. at 28-29, 33-34. [12] Appellant RLEA disagrees, for by investing in an industry engaged in interstate commerce, the Rock Island appellees must first accommodate the public interest before they withdraw their assets from that commerce. *Gibbons* v. *United States* [hereinafter, "*Gibbons* II"], 7th Cir. Nos. 79-2413, *et al.*, decided October 7, 1981, slip op. at 13; *Gibbons* v. *United States* [hereinafter, "*Gibbons* I"], 660 F.2d 225, 229 (7th Cir. 1981). The protection of the interests of employees has been declared by Congress to be necessary to the public interest in this case, Section 102 of RITA, 45 U.S.C. § 1001, [13] and thus, that interest must be accommodated as well.

The Rock Island appellees attempt to limit the extent of the estate's obligation to accommodate the public interest by asserting that at some identifiable point in time the *Brooks-Scanlon* principle

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[12] It should be noted that Order No. 248 in the Rock Island case is the only administrative or court decision adopting the Rock Island appellees' constitutional interpretation of the entire line abandonment doctrine. The Seventh Circuit did not address this issue in affirming that order.

[13] The Rock Island appellees argue that there is a basic illogic in RITA because it requires protection for only unemployed Rock Island employees. R.I. Appellees' Br. at 42-44. What appellees ignore, however, is that Sections 106 and 110 of RITA must be taken together with the "Congressionally-supported" March 4 Hiring Agreement (H. Rpt. No. 96-1430, *supra*, at 138) as providing the requisite protection for all Rock Island employees. The March 4 Agreement, contrary to appellees' allegations, was clearly entered into on the assumption that Sections 106 and 110 of RITA would be enacted to complement its provisions (H. Rpt. No. 96-839, *supra*, at 22). Because of the concessions made by labor in that agreement, more carriers were willing to acquire Rock Island lines. *See, St. Louis S.W. Ry.—Purchase*, 363 I.C.C. 323, 380 (1980).

"absolves a railroad from expanding its funds or consuming its assets in the public interest." R.I. Appellees' Br. at 25. According to those appellees, that point was reached by at least June 2, 1980, when the reorganization court authorized the abandonment of the entire Rock Island line, and thus, their argument continues, no further accommodation can be required. *Id.* at 25-26. The fallacy of that argument is that it fails to recognize the underlying rationale for delaying the withdrawal of assets from rail operations while abandonment authority is obtained. As the Seventh Circuit informed the Rock Island appellees in *Gibbons* II, slip op. at 20 (emphasis added):

> When the continuation of rail service is essential for the protection of the public interest, the courts have . . . determined that the shareholders' right to realize the value of the property *may be held in abeyance for a reasonable period while a solution, acceptable to both the public and private interests, can be devised.*

Consequently, it is only after that solution is devised and implemented that the *Brooks-Scanlon* doctrine absolves the Rock Island from further expenditures in the public interest. *Gibbons* v. *United States* [hereinafter, "*Gibbons* III"], 7th Cir. Nos. 80-2009, *et al.*, decided October 22, 1981 (unpublished), petition for rehearing pending. [14]

Our Constitution gives Congress the power to regulate interstate and foreign commerce (U.S. Const., Art. I, § 8, cl. 3), and thus, it is Congress' responsibility to devise the solution which it believes is required by the public interest. *Accord, Ecker* v. *Western Pac. R.*, 318 U.S. 448, 468 (1943). Section 17(a) of the MRRA and RITA represent the solution which Congress has devised to resolve the transportation crises caused by the demise of the Rock Island, and included in that solution is the command of Congress that the interests of Rock Island employees be protected. Just as the abandonment order did not authorize the immediate withdrawal of the estate's operating properties from rail service (*e.g.*, *Gibbons* III), so too that authorization did not absolve the estate from its obligation to protect the interests of its employees.

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[14] A copy of that decision is attached hereto as Appendix D.

IV. The Rock Island Appellees Have Not Presented Any Other Reason To Conclude That Sections 106 And 110 Of RITA Are Unconstitutional

Even though the District Court premised its October 1980 injunction in this case upon its finding that Sections 106 and 110 of RITA violated the Taking Clause, the Rock Island appellees advance a barrage of other reasons as to why this Court should conclude that the enjoined provisions of RITA are constitutionally infirm. While most of those arguments fail on their own merits once it is accepted that Sections 106 and 110 of RITA do not create new retroactive obligations for the Rock Island estate, but rather compromise a preexisting obligation, two arguments advanced by those appellees should be addressed briefly.

The Rock Island appellees assert that Section 106 of RITA violates the separation of powers doctring by usurping the powers of the judiciary. R.I. appellees' Br. at 46-47. According to those appellees, Congress has usurped the powers of the judiciary by instructing the Rock Island Reorganization Court to enforce whatever employee protection program the ICC may device in this case. Like the Act of Congress before this Court in the *Rail Act Cases*, 419 U.S. at 141-42, Section 106 does not deprive the reorganization court of its powers to resolve constitutional issues; rather, Section 106 simply directs the court to enforce a regulation of commerce in a specific manner. *Cf.*, *ICC* v. *Brimson*, 154 U.S. 447 (1894). Since the power to regulate interstate commerce is a legislative function, Section 106 cannot be viewed as a usurpation of a judicial function.

The Rock Island appellees also rely upon the Bankruptcy Clause of the Constitution (U.S. Const., Art 1, § 8, cl. 4) to assert that Sections 106 and 110 of RITA are infirm because they are non-uniform laws of bankruptcy. R.I. appellees' Br. at 50-53. Appellees' arguments on this point, however, fail to recognize that Congress, in the exercise of its Commerce Clause powers, can enact laws which affect railroads in reorganization. Moreover, those laws, as shown by Appendix E to this brief, can be specific and address a particular crisis confronting Congress. *Wilson* v. *New*, 243 U.S. 332 (1917) (upholding Pub.L. No. 252, 39 Stat. 721 (1916)). Also, when RITA is viewed side-by-side with the MRRA, it becomes clear that it is uniform within the

meaning of the Bankruptcy Clause. *Rail Act Cases*, 419 U.S. at 159 ("uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country. . . .")[15]

CONCLUSION

For the reasons set forth in appellant's opening brief, and herein, and for those additional reasons to be stated at oral argument, it is respectfully submitted that the relief requested in the opening brief should be granted.

Respectfully submitted,

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Date: November 25, 1981

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[15] Appellees assert (R.I. Appellees' Br. at 52) that Section 106 of RITA cannot be uniform because no similar provision was imposed upon the New York, Susquehanna & Western Railroad. *See*, note 10, *supra*. Appellant RLEA disagrees because as Congress explained in the Staggers Rail Act's Conference Report (H. Rpt. No. 96-1430, *supra* at 138-39), Congress draws a distinction between major disruptions to commerce and those caused by the demise of a railroad the size of the Susquehanna. While appellant RLEA disagrees with this distinction, it is a distinction which Congress obviously has the power to make. *E.g.*, *Wilson* v. *New*, *supra*.

APPENDIX

APPENDIX C

***In re New York, Susquehanna & Western Railroad (Appeals Of RLEA)*, 3rd Cir. Nos. 81-1121 And 81-1929, Decided November 16, 1981**

APPENDIX C

United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 81-1121, 81-1929

In the Matter of
NEW YORK, SUSQUEHANNA AND WESTERN
RAILROAD COMPANY,

Debtor

RAILWAY LABOR EXECUTIVES' ASSOCIATION,

Appellant

Appeal From The United States District Court
For The District Of New Jersey
(D.C. No. B-76-0182 In Bankruptcy)

Argued November 12, 1981

Before: SEITZ, *Chief Judge*, GARTH, *Circuit Judge*,
and CAHN, *District Judge**

JUDGMENT ORDER

After consideration of the contentions raised by the appellant and for essentially the reasons set forth in the district court's opinion at 504 F. Supp. 851 (D.N.J. 1980), *see also In re Chicago, Rock Island & Pacific R.R.*, Nos. 80-1788, -2199, -2286 (7th Cir. Oct. 13, 1981), it is

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*Honorable Edward N. Cahn, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

ADJUDGED AND ORDERED that the judgments of the district court dated November 25, 1980 and April 14, 1981 be and the same are hereby affirmed.

Costs will be taxed against the appellant.

BY THE COURT:

/s/

Circuit Judge

Attest:

Chief Deputy Clerk

DATED: November 16, 1981

APPENDIX D

***Gibbons* v. *United States*, 7th Cir. Nos. 80-2009, 80-2455, 81-1026 and 80-2010, decided October 22, 1981 (unpublished per curiam order)**

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

ARGUED SEPTEMBER 22, 1981
October 22, 1981

Unpublished Order
Not To Be Cited Per Circuit Rule 35

Before

HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. WILLIAM J. BAUER, *Circuit Judge*
HON. EDWARD DUMBAULD, Senior *District Judge**

Nos. 80-2009, 80-2455 and 81-1026

WILLIAM M. GIBBONS, as Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents.

and

No. 80-2010

WILLIAM M. GIBBONS, as Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents,

REGIONAL TRANSPORTATION AUTHORITY,
Party Respondent.

Administrative Review of Orders of the Insterstate Commerce Commission.

*Honorable Edward Dumbauld, Senior District Judge for the Western District of Pennsylvania, is sitting by designation.

ORDER

The Trustee, creditors and shareholders of the Chicago, Rock Island and Pacific Railroad Company (collectively the Rock Island) have sought review of four directed service orders of the Interstate Commerce Commission (ICC), issued under Sections 104, 120 and 122 of the Rock Island Railroad Transition and Employee Assistance Act, 45 U.S.C. §§ 1003, 1015, 1017 (RITA). Three of the orders relate to the compensation for the temporary use of relatively short mileage of the Rock Island's tracks by the Illinois Regional Transportation Authority and by the Wabash Valley Railroad Company. The fourth order relates to the authorization by the ICC to 16 railroads to provide temporary voluntary service on various portions of the Rock Island system.

After both sides had filed their principal briefs in this appeal, this court decided *Gibbons v. United States*, Nos. 80-1786 and 80-1858 (August 26, 1981) (*Gibbons* I), which caused the Rock Island to restructure its arguments in its reply brief. After oral argument in this appeal, the court decided *Gibbons v. United States*, Nos. 79-2413, 80-1111, 80-1383 and 80-1538 (October 7, 1981) (*Gibbons* II). On the basis of *Gibbons* I and *Gibbons* II, as well as what follows in this order, the four ICC orders are affirmed.

I

A very brief history of the Rock Island reorganization will place the current issues in some perspective. The 10,468-mile Rock Island system filed for reorganization under Section 77 of the Bankruptcy Act of 1938, 11 U.S.C. § 205, on March 17, 1975. On September 26, 1979, shortly following the commencement of a strike by the Brotherhood of Railway and Airline Clerks and the United Transportation Union, the ICC found the Rock Island to be "cashless" and ordered the Kansas City Terminal Railway Company (KCT) to provide directed service over substantially all the Rock Island lines. [1]

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[1] A cashless railroad cannot be forced to continue operating, *In re Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 611 F.2d 662, 669 (7th Cir. 1979), but nevertheless must fulfill its common carrier obligation of providing service. *Gibbons* I, slip op. at 8; *Gibbons* II, slip op. at 14.

Until March 23, 1980, when federal subsidies ran out, the ICC directed KCT to provide federally subsidized service on the Rock Island system under the mandatory, directed rail transportation section of the Interstate Commerce Act. 49 U.S.C. § 11125. *Gibbons* II affirmed the ICC orders directing the KCT temporary service.

Between March 23 and May 31, 1980, the end of the 240-day period for directed service under Section 11125, the ICC could no longer federally subsidize directed service, so it issued permissive unsubsidized service orders to other rail carriers. The permissive orders provided that each operating carrier and the Rock Island Trustee could negotiate the terms of compensation due the Rock Island and, failing to reach agreement, the ICC would set reasonable compensation. Meanwhile on May 27, 1980, the ICC recommended to the reorganization court that the Rock Island system be abandoned except for certain specified lines which the Trustee should attempt to sell for continued rail service. On June 2, 1980, the reorganization court ordered abandonment consistent with the recommendations of the ICC.

On May 30, 1980, a few days after the ICC recommended abandonment and a few days before the reorganization court ordered abandonment, Congress enacted the Rock Island Railroad Transition and Employee Assistance Act, 45 U.S.C. §§ 1001-1018.

During the interim period of permissive unsubsidized service orders between March 23 and May 31, 1980, the ICC issued its Revised Service Order No. 1451 authorizing the St. Louis-San Francisco Railway Company (Frisco) to operate on specified Rock Island tracks in Kansas, Texas and Oklahoma. 45 C.F.R. 25402 (April 14, 1980). The Rock Island Trustee and Frisco were unable to negotiate an agreed compensation to be paid by Frisco. Upon Frisco's petition, the ICC fixed compensation at $1,250 per route mile per year, payable on a monthly basis in advance, plus 14.4% of net revenues or profit, if any. In addition, Frisco was required to provide for the security and maintenance of the Rock Island's rail properties actually utilized by Frisco in providing interim service. 363 I.C.C. 248 (1980). This so-called "Frisco compensation formula" for compensating the Rock Island for the temporary use of its lines was applied by

the ICC in most of the interim service orders, including three of the four orders challenged in this appeal. *Gibbons* I affirmed the ICC orders directing the permissive interim service and the application of the Frisco compensation formula to that service.

In both *Gibbons* I and *Gibbons* II, it was unsuccessfully argued that the mandated and permissive directed orders constituted a taking of private property without just compensation in violation of the Fifth Amendment. Rock Island now argues that in this case the ICC orders took effect *after* a total and system-wide abandonment, whereas *Gibbons* I (and *Gibbons* II also) approved ICC directed orders effective *prior* to abandonment.

II

Appeal number 80-2010 challenges Supplemental Order No. 3 to Directed Service Order No. 1437, served by the ICC on May 30, 1980, issued pursuant to Section 120 of RITA, 45 U.S.C. § 1015, and extending for two years the authorization of the Illinois Regional Transportation Authority (RTA) to provide without federal subsidization commuter service over the 40.6-mile Chicago-Joliet line owned by the Rock Island.

Section 120 of RITA provides:

> (a) In the event agreement cannot be reached between the Rock Island Railroad and any party desiring to provide commuter service, the Commission shall order directed service, for the 2-year period beginning on May 30, 1980, over any passenger commuter line of the Rock Island Railroad that was in operation on March 1, 1980, if the directed service carrier agrees to provide such service without payment under section 11125(b)(5) of Title 49. If the parties are unable to agree on compensation, the trustee of the Rock Island Railroad shall receive compensation for the property and facilities of the Rock Island Railroad on terms determined by the Commission to be reasonable.
>
> (b) Notwithstanding any other provision of law, a passenger commuter line of the Rock Island Railroad over which directed service is provided pursuant to this section may not be abandoned, and service over such line may not be discontinued, during the period of such directed service.

45 U.S.C. § 1015.

The reorganization court in its abandonment order of June 2, 1980, noted that "in entering this order, the Court is cognizant that a further order may be required with respect to passenger commuter service pursuant to Section 120 of the Rock Island Transition and Employee Assistance Act."

Pursuant to Section 120, the ICC issued Supplemental Order No. 3 to DSO 1437, authorizing the RTA to operate 40.6 miles of Rock Island commuter track for two years. The DSO provided that the RTA maintain the Rock Island line and preserve it for the Rock Island estate, and compensate it according to the Frisco formula, adjusted to apply costs and revenues of commuter service operations.

Congress has seen fit to postpone abandonment of the relatively small commuter trackage for two years. The reorganization court realized that its order of abandonment would perhaps require a separate order of abandonment covering the commuter facilities after the expiration of the two-year period. The Rock Island has not contested the power of Congress to enact Section 120 but instead has argued that the Rock Island has abandoned the commuter line and that Congress has in effect ordered the RTA not to abandon it. Congress clearly provided that "a passenger commuter line of the Rock Island . . . may not be abandoned." It may not be abandoned by either the Rock Island or by a directed service carrier such as the RTA. Thus there is no taking under the Fifth Amendment in accordance with both *Gibbons* I and *Gibbons* II.

The Rock Island next complains of the application of the Frisco formula. Section 120 gives the ICC the power to determine reasonable compensation if the parties are unable to agree on that subject. *Gibbons* I held the Frisco formula to be reasonable as applied to the RTA for the permissive directed service between March 24 and May 31, 1980. Congress intended by Section 120 of RITA that the interim compensation continue. The House Conference Report on RITA commented as to Section 120: [2]

> The Conference substitute adopts the House provision with changes to indicate that the applicability of the section is limited to passenger service and the Rock Island is to receive such

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[2] H. R. Rep. No. 96-1041, 96th Cong., 2d Sess. 33, *reprinted in* [1980] U.S. Code Cong. & Ad. News 1194.

> compensation as the Commission finds to be reasonable if the parties cannot reach agreement on compensation for the use of Rock Island properties and facilities. In determining compensation under this section it is the conferees' desire that the Commission follow standards similar to those used in determining compensation to be paid to the trustee by interim operators in previous compensation determinations.

We can only conclude that the Frisco compensation formula is reasonable as applied here.

III

Appeals numbers 80-2455 and 81-1026 challenge Directed Service Order No. 1482, served by the ICC on August 15, 1980, issued pursuant to Section 104 of RITA, 45 U.S.C. § 1003, and authorizing the Wabash Valley Railroad Company (Wabash Valley) to operate for 90 days over two segments of Rock Island track in Kansas totaling 196.4 miles.

As we have noted, a few days before the reorganization court ordered abandonment,[3] Congress enacted RITA, first finding, among other things, that

> (3) a cessation of necessary operations of the Rock Island Railroad would have serious repercussions on the economies of the States in which such railroad principally operates; and
>
> (4) premature cessation of services over lines which are the subject of pending purchase application would result in harm to the shipping public and could imperil continuation of vital commuter service.

45 U.S.C. § 1001.

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[3] It should also be noted that the reorganization abandonment order was subject to all of the recommendations of the ICC in its abandonment recommendation to the Court, wherein it contemplated a "keeping in place and attempting to sell, for a reasonable period of time, upon reasonable terms" some 30 portions of the Rock Island system "for continued rail service." Brief of Petitioners, App. G at 33. This procedure contemplated a gradual phasing of the Rock Island abandonment and not a total abandonment as of June 2, 1980.

Section 104(a) of RITA provides:

> Notwithstanding the provisions of section 11125 of Title 49, or Public Law 96-131, the Commission shall order directed service for a period of not to exceed 90 days over any line of the Rock Island Railroad if the Secretary finds and certifies to the Commission that —
>
> (1) a lack of rail service exists which cannot be resolved by a grant of interim operating authority over such line and grains or foods are ready to be shipped to market; or
>
> (2) a lack of rail service exists which cannot be resolved by a grant of interim operating authority over such line and a rail carrier, shipper, State or other interested party has expressed in writing to the Secretary an interest in purchasing, leasing, or rehabilitating the particular rail line or facility for purposes of providing rail services, and there is a reasonable expectation that such transaction will be consummated.

45 U.S.C. § 1003(a).

Pursuant to Section 104(a), the Secretary of Transportation certified the Wabash Valley as satisfying the RITA conditions, and the ICC issued Directed Service Order 1482. This DSO authorized the Wabash Valley to operate 196.4 miles of Rock Island track for 90 days. It further provided that Wabash Valley maintain the lines and facilities, and compensate Rock Island according to the Frisco formula.

Again, Congress provided the ICC with the power in Section 104(a) to authorize the Wabash Valley to operate another relatively short section of Rock Island trackage for only 90 days. The ICC abandonment recommendations, adopted by the reorganization court, contemplated a phasing out of abandonment as to certain vital continued service. The Frisco compensation, which, as we have previously observed, includes what is most important to the bankruptcy estate, that is, maintenance of the used facilities by the lessee carrier, has been provided to the Rock Island. We conclude that the application of the Frisco formula to the limited Wabash Valley situation was proper.

Finally, the Rock Island claims that the ICC failed to comply with the rulemaking procedures of the Administrative Procedure Act and

the Interstate Commerce Commission Act. Section 104(a) of RITA provides that "the Commission shall order directed service" and Section 120(a) includes the same words. The procedure for ordering directed service is lodged in 49 U.S.C. § 11125. Section 11125(a) provides that "the Commission may act without regard to subchapter II of chapter 103 of this title [Interstate Commerce Act rulemaking procedure] and subchapter II of chapter 5 of title 5 [Administrative Procedure rulemaking procedure]."

IV

Appeal number 2009 challenges Service Order No. 1473, served by the ICC on May 30, 1980. This order was issued pursuant to Section 122 of RITA, 45 U.S.C. § 1017, and authorized 16 railroads, which were willing to do so voluntarily, to use the Rock Island tracks and facilities.

Section 122(a) of RITA provides:

> The Commission may authorize any rail carrier willing to do so voluntarily to use the tracks and facilities of the Rock Island Railroad or the Milwaukee Railroad. The use of such tracks and facilities shall be under such terms of compensation as the carriers establish between themselves, or if the carriers are unable to agree, under such terms of compensation as the Commission finds to be reasonable.

45 U.S.C. § 1017(a).

Pursuant to 122(a), the ICC authorized the 16 railroads to use specified portions of Rock Island facilities, many of which had been originally made subject to continued rail service in the ICC abandonment recommendations adopted by the reorganization court in the June 2, 1980 abandonment order.

No compensation determinations have been made pursuant to SO No. 1473 and it is not clear whether the Rock Island is still pressing this claim. In any event, however, on September 21, 1981, one day before oral argument in this appeal, the ICC served a notice requesting all interested persons to file comments or provide information and argument as to "whether, and for how long, this service over Rock Island should be permitted to continue, especially where efforts are

not being made to purchase or lease the Rock Island lines" and "whether, if operating authority is continued [the Commission] should continue to prescribe the Frisco formula." In view of this development, the ICC should be permitted to proceed. If the resulting order is not satisfactory to any interested party, that order presumably could be reviewed here.

The four orders of the ICC reviewed here are affirmed.

AFFIRMED.

APPENDIX E

Ad Hoc Congressional Legislation Concerning Strikes

1. Pub. L. No. 252, 39 Stat. 721 (1916)
   Approved: September 3, 5, 1916.

   Purpose: To establish an eight-hour day for employees of carriers engaged in interstate and foreign commerce.

2. Pub. L. No. 88-108, 77 Stat. 132 (1963)
   Approved: August 28, 1963

   Purpose: To prevent changes in status quo and to establish an arbitration board to settle a labor dispute between Class I railroads and five operating brotherhoods.

3. Pub. L. No. 90-10, 81 Stat. 12 (1967)
   Approved: April 12, 1967

   Purpose: To delay for 20 days a nationwide rail strike by six shopcraft unions against most of the nation's major rail lines by extending the status quo period under Section 10 of the Railway Labor Act for those disputes.

4. Pub. L. No. 90-13, 81 Stat. 13 (1967)
   Approved: May 2, 1967

   Purpose: To amend the period established in Pub. L. No. 90-10 to further delay the strike threatened by the six shopcraft unions.

5. Pub. L. No. 90-54, 91 Stat. 122 (1967)
   Approved: July 17, 1967

   Purpose: To create a Special Board and to provide a procedure for the final disposition of the dispute between the six shopcraft unions and most of the nation's Class I carriers involved in Nos. 3 and 4, *supra*.

6. Pub. L. No. 91-203, 84 Stat. 22 (1970)
   Approved: March 4, 1970

   Purpose: To prohibit for 37 days, any strikes or lockouts with respect to a dispute between the carriers represented by the National Railway Labor Conference and four shopcraft unions.

7. Pub. L. No. 91-226, 84 Stat. 118 (1970)
   Approved: April 9, 1970

   Purpose: To settle the dispute which was the subject of Pub. L. No. 91-203 by establishing as the contract the terms of a memorandum of understanding which had been agreed to by the negotiators for all of the parties.

8. Pub. L. No. 91-541, 84 Stat. 1407 (1970)
   Approved: December 10, 1970

   Purpose: To prohibit, until March 1, 1971, any strikes or lockouts with respect to a dispute between Class I carriers and four rail unions. Also, it provided for a five percent (5%) pay increase for the employees involved.

9. Pub. L. No. 92-17, 85 Stat. 39 (1971)
   Approved: May 18, 1971

   Purpose: To prohibit until October 1, 1971, any strikes or lockouts with respect to a two-day nationwide strike precipitated by a walkout of 10,000 railway signalmen. Also, it provided for a pay increase of approximately 13.5% for the employees in the dispute.

10. Pub. L. No. 92-235, 86 Stat. 40 (1972)
    Approved: February 21, 1972
    Purpose: To provide for a procedure to end a longshoremen dispute on the West Coast docks. This measure was signed on February 21, 1972, "as a gesture" since the dispute had been resolved by the parties on February 19, 1972.

11. Pub. L. No. 93-5, 87 Stat. 5 (1973)
Approved: February 9, 1973

Purpose: To extend for 90 days the status quo provisions of the Railway Labor Act with respect to a dispute between the Penn Central Railroad and the United Transportation Union. Also, the statute provided that the Secretary of Labor was to submit to the Congress a full, comprehensive report regarding the progress of the negotiations and any recommendations for a solution. The Secretary of Transportation was also required to submit a report to Congress concerning a plan to preserve essential rail service in the Northeast.

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Nos. 80-415 and 80-1239

In the Supreme Court of the United States

OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION, APPELLANT

v.

WILLIAM M. GIBBONS, TRUSTEE, ET AL.

ON CONSOLIDATED APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS AND THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL APPELLEES

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In the Supreme Court of the United States

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RAILWAY LABOR EXECUTIVES' ASSOCIATION, APPELLANT

v.

WILLIAM M. GIBBONS, TRUSTEE, ET AL.

ON CONSOLIDATED APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS AND THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL APPELLEES

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1. The private appellees' contention (Br. 2-3) that this Court lacks jurisdiction of the appeal in No. 80-415 is without merit. Both the notice of appeal and the jurisdictional statement were timely filed in accordance with 28 U.S.C. 2101(a) and the Rules of this Court. The Federal Rules of Appellate Procedure, on which the private appellees rely, apply to appeals to the courts of appeals, not to this Court. See Fed. R. App. P. 1(a). Thus, there is no rule that nullifies a notice of appeal to this Court when a motion to vacate is filed, and there is no reason to imply such a rule.[1] In any event, as we noted in our opening brief (Br. 9-10 n.9), the injunction challenged in No. 80-415 was mooted by passage of the Staggers Rail Act and has no continuing effect.

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[1]The filing of a notice of appeal to the court of appeals dockets the appeal (see Fed. R. App. P. 12(a)), and the appeal will then proceed

2. The private appellees' argument that the labor protection provisions of the Rock Island Act effect a taking rests primarily on a misinterpretation of one case, *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396 (1920). The private appellees repeatedly assert (Br. 25-28, 33-34, 40) that at a certain point *Brooks-Scanlon* "absolves a railroad from expending its funds or consuming its assets in the public interest" (Br. 25), and they contend that that point was reached here when the district court determined that the Rock Island could not be reorganized as an operating railroad. But *Brooks-Scanlon* holds only that a railroad may not be forced to continue operations indefinitely once it is determined that the railroad cannot be reorganized on a profit-making basis. That determination of unreorganizability, however, does not instantly relieve a railroad of all of its existing common carrier obligations, even though the satisfaction of those obligations may require the expenditure of funds that would otherwise be available to the creditors of the estate. It simply entitles the railroad to cease operations within a reasonable period of time upon the receipt of a certificate of abandonment.[2] See *New Haven Inclusion Cases*, 399 U.S. 392, 461 (1970); *Lehigh & New England Ry.* v. *ICC*, 540 F. 2d 71, 82-83 (3d Cir. 1976), cert. denied, 429 U.S. 1061 (1977).

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unless the notice of appeal is withdrawn. It is therefore a sensible rule of practice for the notice of appeal to be nullified if further review is sought in the lower court. See Advisory Comm. Note to Fed. R. App. P. 4(a)(4), 28 U.S.C. (Supp. III). In this Court, however, an appeal is not docketed until the jurisdictional statement is filed (see Sup. Ct. R. 12), and there is thus no reason to nullify a notice of appeal that has been filed where the appeal has not yet been docketed.

[2]As we explained in our opening brief (Br. 27), even a railroad found to be unreorganizable may be required to continue operating at a loss for some period of time in order to permit an examination of alternatives to total abandonment. See *In re Valuation Proceedings Under §§ 303(c) & 306 of the Regional Rail Reorganization Act*, 439 F. Supp. 1351, 1371 (Spec. Ct. 1977).

The private appellees' interpretation of *Brooks-Scanlon* has recently been rejected emphatically by the Seventh Circuit in a series of cases affirming Commission orders authorizing other rail carriers to provide service over Rock Island lines. The private appellees argued there that these directed service orders constituted a taking because the Rock Island has been declared "cashless" and unreorganizable and therefore was relieved of its common carrier obligations. The court of appeals held that "even if the Rock Island cannot operate, it must still fulfill its obligations under the Interstate Commerce Act." *Gibbons* v. *United States*, 660 F. 2d 225, 229 (7th Cir. 1981). See also *Gibbons* v. *United States*, Nos. 80-2009, 80-2010, 80-2455 and 81-1026 (7th Cir. Oct. 22, 1981), slip op. 4, 7; *Gibbons* v. *United States*, Nos. 79-2413, 80-1111, 80-1383 and 80-1538 (7th Cir. Oct. 7, 1981), slip op. 13-16. Thus, the district court's finding that the Rock Island cannot be reorganized does not immediately terminate its obligations to act in the public interest.[3]

Labor protection is an existing common carrier obligation for which a railroad remains responsible even if it cannot be reorganized. The private appellees object, however, that the requirement that the Rock Island pay labor protection to its separated employees requires the "moribund Rock Island" to expend funds in furtherance of the national transportation policy although it no longer participates as a carrier (Br. 27-28) and that the labor protection

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[3]The Commission found the Rock Island to be "cashless" on September 26, 1979, and the reorganization court authorized the abandonment of the railroad on June 2, 1980. The *Gibbons* cases hold that neither of these events terminated the Rock Island's public service obligations. The cases cover directed service orders that were effective (1) between October 1979 and March 1980; (2) between March 1980; and (3) beginning in May 1980 and May 1980; and continuing well beyond the date of the district court's June 2, 1980, order.

plan does not further the public interest (Br. 43-44). These objections ignore the benefits to the estate under the legislation at issue here—*e.g.*, the availability of a federal loan for funding the labor protection expense and the expedited review process that minimizes delay that might erode the estate. See H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 138 (1980). But more fundamentally, these assertions rest on a misunderstanding of the role of labor protection in furthering the national transportation policy.

The expectation that labor protection will be paid promotes the stability of the work force. It ensures that, in times of economic distress in the railroad industry, employees will not leave their jobs to look for other work because they know they have some protection if their jobs are eliminated. See *United States* v. *Lowden*, 308 U.S. 225, 236 (1939). During the many years of its existence, particularly in recent years when it was known to be in financial trouble, the Rock Island reaped the benefits of this stability. Labor protection that is paid now when its employees are separated is simply a fulfillment of a longstanding obligation that arose during the Rock Island's years of service; it is not a "wholly new" (Br. 34) obligation that furthers some current transportation policy from which the Rock Island derives no benefit. Indeed, the Rock Island's employee protection obligation, which was a known condition attached to its participation in the railroad industry, would be a nullity if the railroad were released from its obligation upon the occurrence of the very event that triggers the need for protection—economic difficulties that result in elimination of the employees' jobs. To release the railroad from its labor protection obligations in the event of a liquidation would destroy the employees' security in their railroad jobs and the consequential work force stability that is critical to the national transportation policy. Moreover, as Congress pointed out, it would "promote liquidations to the detriment of the employees and the public interest." H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 138-139 (1980).

The private appellees also contend (Br. 28-34, 39-40) that the imposition of a labor protection obligation upon a whole line abandonment constitutes a taking because of the degree to which it interferes with their investment-backed expectations. This contention rests primarily on the fact that the Commission historically has refrained from imposing labor protection in most whole line abandonments. As explained in our opening brief (Br. 29-31), however, the Commission's prior policy gave no assurance that it would not exercise its discretion to impose labor protection in the case of an abandonment of the Rock Island, one of the nation's major railroads. Moreover, Congress had enacted legislation in 1976 and 1979 that, on its face, appeared to require the imposition of labor protection in the case of an abandonment. While the reorganization court, recently affirmed by the court of appeals (*In re Chicago, Rock Island & Pacific R. R.*, Nos. 80-1788, 80-2199 and 80-2286 (7th Cir. Oct. 13, 1981)), interpreted the statute as giving it discretion to decline to impose labor protection, that interpretation is open to question (see H.R. Rep. No. 96-839, 96th Cong., 2d Sess., Appendix II, 63-66 (1980)), and the creditors of the Rock Island could hardly have counted on such an interpretation. In short, while investors in the Rock Island had reason to hope that labor protection would not be imposed in the event of an abandonment, Congress' contrary decision did not destroy any legitimate investment-backed expectations of theirs such that it should be characterized as a taking. Rather, the labor protection provisions of the Rock Island Act are simply an exercise of Congress' regulatory power.

3. The private appellees raise in defense of the judgment below several constitutional objections not relied on by the district court. These arguments are insubstantial.

a. Contrary to the private appellees' contention (Br. 50-53), the Rock Island Act does not violate the requirement in

Article I, Section 8, Clause 4 of the Constitution that Congress establish "uniform Laws on the subject of Bankruptcies through the United States." First, the Act is not a law on the subject of bankruptcies. It does not concern the relations between an insolvent debtor and his creditors (see *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry.*, 294 U.S. 648, 672-673 (1935)), but rather concerns the obligations of a common carrier to shield its employees from economic loss in furtherance of the national transportation policy. Thus, the Act is clearly an exercise of congressional power under the Commerce Clause. See *United States* v. *Lowden, supra*, 308 U.S. at 239-240. As explained in our opening brief (Br. 22-24), the Act indisputably was a rational response by Congress to the rail service crisis in the Midwest, and hence it is a legitimate exercise of the Commerce Power. See, *e.g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Association*, Nos. 79-1538, 79-1596 (June 15, 1981), slip op. 9-10.

Even assuming that the uniformity requirement applies to the Rock Island Act, it is violated only when a statute treats two entities differently on a geographical basis. See *Hanover National Bank* v. *Moyses*, 186 U.S. 181, 188 (1902). As the private appellees acknowledge (Br. 51), a statute directed at railroads in a particular geographical region does not violate the uniformity requirement when there is a geographically isolated problem. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 159 (1974). Here, the Rock Island Act was passed to deal with the specific problems caused by the collapse of the Rock Island. To the extent that these problems are analogous to those faced by other railroads, Congress has indicated that there will not be disparate treatment. The employee protection provisions of the Rock Island Act were specifically "patterned after the Milwaukee Railroad Restructuring Act." H.R. Conf. Rep.

No. 96-1041, 96th Cong., 2d Sess. 25 (1980).[4] And Congress noted in its consideration of the Staggers Act that "it is the intention of Congress that employee protection is imposed in bankruptcy proceedings involving major rail carriers." H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 138-139 (1980).[5] Hence, there is no uniformity problem. For the same reasons, to the extent that the Rock Island Act is construed as creating a classification, it is one that has a rational basis and, contrary to the private appellees' contention (Br. 53-55), does not violate the equal protection component of the Due Process Clause.

b. The private appellees contend (Br. 45-49), primarily in reliance on *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871), that the labor protection provisions of the amended Rock Island Act contravene the doctrine of separation of powers because they represent an effort to direct the ultimate outcome of a pending case. This contention reflects a misconstruction of both *Klein* and the Act.

As we have shown in our opening brief (Br. 29-30), the Commission has always had the power, conferred by statute, to require the implementation of employee protection plans as a condition on approval of whole line abandonments. Congress is surely free, in response to its perception

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[4]The fact that the private appellees consider the situations of the Milwaukee and the Rock Island to be distinguishable (see Br. 52 n.27) hardly indicates that the statute fails for lack of uniformity.

[5]Congress' failure to impose a labor protection obligation on the New York, Susquehanna, and Western Railroad does not require a finding that the Rock Island Act violates the uniformity requirement. The Constitution does not forbid the drawing of rational distinctions between different classes of railroads. The Susquehanna is a tiny railroad with few employees. *In re New York, Susquehanna & Western R. R.*, 504 F. Supp. 851, 855, 858 (D. N.J. 1980), aff'd per curiam, No. 80-1121 (3d Cir. Nov. 16, 1981). The Commission traditionally has not imposed labor protection in connection with abandonments of such minor carriers, and Congress has expressly indicated its desire to distinguish between major carriers like the Rock Island and minor carriers like the Susquehanna. See *id.* at 863.

of a threatened impact on interstate commerce, to particularize its delegation of power to the Commission on this subject and to enact companion measures, such as the loan guarantee and the expedited process for judicial review. Congress does not unconstitutionally infringe on the judicial power by thus clarifying and supplementing the applicable law, even while a case is pending. See *Dames & Moore* v. *Regan*, No. 80-2078 (July 2, 1981), slip op. 26.

This is not an instance, like *Klein*, in which Congress sought to require the "dismissal of [a] suit in which the Court of Claims had given judgment for the claimant." *Pope* v. *United States*, 323 U.S. 1, 8 (1944). Far from "discarding [a] final judgment[]" of a court (*United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 431-432 (1980) (Rehnquist J., dissenting)), Congress has expressly provided procedures for expedited judicial review of the question that the private appellees contend (Br. 46) had already been decided by Judge McGarr—the constitutionality of imposing labor protection conditions on the abandonment.

The private appellees' related due process argument (Br. 48-49) is without merit for the same reasons. Congress has exercised its legislative power to regulate interstate commerce, and appellees are now free to pursue, through the judicial process, their claim that the effect of that exercise of power constitutes an uncompensated taking of their property.

c. The private appellees' contention (Br. 55-60) that the labor protection provisions of the Rock Island Act amount to an imposition of retroactive liability that violates the Due Process Clause is predicated on their view that these provisions impose a wholly new obligation from which they were effectively immunized prior to passage of the Act. As we have explained above (pages 3-5, *supra*), that is an erroneous premise.

The fact that the Rock Island investors had no assurance that employee protection conditions would not be imposed upon an abandonment of their railroad lines distinguishes this case from *Railroad Retirement Board* v. *Alton R. R.*, 295 U.S. 330 (1935), and *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). Indeed, in *Turner* the Court upheld the federal statute against a due process challenge even though it accepted the possibility that liability for black lung benefits was being imposed on coal mine operators who might have carried out their operations "in reliance upon the current state of the law, which imposed no liability on them for disabling pneumoconiosis." *Id.* at 17. Thus, *Alton* does not control this case, even assuming its continued vitality, and this is a is more compelling case than *Turner* for upholding the statute against a due process retroactivity challenge.

But even assuming that the Rock Island Act, like the statute in *Turner*, has "some retrospective effect" (428 U.S. at 16), it does not violate the Due Process Clause. The Act is a rational exercise of Congress' broad powers under the Commerce Clause and, as explained above (pages 4-5, *supra*), reflects a national policy from which the Rock Island's owners benefited during years when the railroad was attempting to sustain its operations. See 428 U.S. at 18-19.

4. Appellants agree with the government that the Rock Island Act does not effect an unconstitutional taking of property because the Tucker Act would provide just compensation if a taking were to be found (Br. 31-32). Appellants contend (Br. 25-29), however, that, because of the existence of that remedy, the Court should not now reach the taking question. On the other hand, the private appellees agree with the government (Br. 66-68) that this Court should reach the taking question, but they contend (Br. 61-66) that the availability of the Tucker Act remedy does not eliminate the Just Compensation Clause violation that they allege.

a. For the reasons stated in our opening brief (Br. 18-20), the Court should resolve the taking question at this stage, as it did in similar circumstances in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 147-148, 149-150 n.36 (1974), with respect to the question whether offering stock in exchange for rail properties constituted a taking. The reorganization court has held that the imposition of labor protection provisions constitutes a taking regardless of how modest the cost of the plan ultimately agreed upon by the Trustee and the unions or devised by the Commission (see J.S. App. 5a-6a, 18a-19a). That is a purely legal conclusion, and since the maximum extent of the estate's liability under the Rock Island Act is fixed by the statute, there is nothing to be gained by awaiting further factual development. Compare *Hodel* v. *Virginia Surface Mining & Reclamation Association, supra*, slip op. 30-31. There is, however, a strong public interest in a final determination of the taking question now.

b. There is no merit to the private appellees' contention (Br. 62-63) that *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), supports the proposition that, despite the availability of the Tucker Act remedy, the Rock Island Act may nonetheless be enjoined as an unconstitutional taking. *Youngstown* concerned an action unauthorized by any statute. The Court then had serious doubts that the Tucker Act would apply to such unauthorized action (343 U.S. at 585), and it has since concluded (*Regional Rail Reorganization Act Cases, supra*, 419 U.S. at 127 n.16, quoting *Hooe* v. *United States*, 218 U.S. 322, 336 (1910)) that " '[t]he taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the Government,' and hence recovery is not available in the Court of Claims."[6]

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[6]We agree with the private appellees (Br. 61) that the availability of the Tucker Act remedy would not cure constitutional infirmities of

The private appellees' allegations (Br. 63-64) of irreparable injury take little account of their concession elsewhere (Br. 39) that, because of the Act's provision for a federal loan of up to $75 million to pay the costs of an employee protection plan, it cannot be expected that "the present cash position of the estate" will be depleted. Moreover, the various other injuries about which the private appellees speculate are finally translatable into economic loss and thus are not beyond monetary remedy. The fact that the estate may have an "uncertain claim" subject to litigation (see Pvt. App. Br. 63) surely does not constitute a circumstance unique to this particular bankruptcy proceeding. In any event, if this Court rules on the taking question, then the estate will not face an "uncertain claim" under the Tucker Act. Either there is *no* taking, in which case the estate will be liable for the employee protection plan in an amount determined by the expedited procedures established by Congress, or there *is* a taking, in which case the estate will enjoy a certain right to full reimbursement for the costs of the plan.

Finally, the private appellees contend (Br. 64) that this case is no different from any case in which "citizens with available funds" are ordered by Congress "to pay [a] public expense," with the proviso that they can later seek reimbursement under the Tucker Act. This assertion is frivolous. Such a law undoubtedly would be struck down as a violation of due process if there were no rational connection between the citizen charged with this obligation and the public expense in question. The employees who would benefit from the labor protection provisions at issue here, however, are not strangers having no connection with the Rock Island Railroad, and the Rock Island is hardly an

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other kinds. As we have argued above (pages 5-9, *supra*), however, the private appellees' other constitutional claims are insubstantial.

innocent bystander saddled with a wholly unexpected obligation. The employees are individuals who spent part of their work lives in an industry plagued with a persisting problem of partial and total line abandonments and who may now, as a result of their employment with the Rock Island, lack the skills needed for employment in different kinds of work in more affluent sectors of the economy. The labor protection provisions of the Rock Island Act represent a rational legislative judgment that properly takes that factor into account.

CONCLUSION

For the foregoing reasons, and for those stated in our opening brief, the judgment of the court of appeals in No. 80-1239 should be reversed, and the order of the district court in No. 80-415 should be vacated as moot.

Respectfully submitted.

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